

**SUBMISSION TO THE BOARD OF TAXATION  
ON THE DEFINITION OF A CHARITY**

**BY THE CATHOLIC CHURCH IN AUSTRALIA**

**OCTOBER 2003**

## Executive Summary

- The structure of the Catholic Church is complex and comprises of many entities. The *Charities Bill 2003* (“the Bill”) is unworkable for the Catholic Church as it requires an assessment to be made of the characteristics of each entity in isolation. The character of the Catholic Church entities can only be fully understood in the context of the overall Church and the relationship between the entities. If such entities are required to be assessed in isolation, some entities may cease to qualify as charities.
- Various elements of the Bill are ambiguous and create confusion in relation to scope. The Bill therefore fails to give “greater clarity and transparency” to charities as it is uncertain how the element would be interpreted and whether the interpretation would disqualify certain entities as charities.
- Some aspects of the Bill including “not-for-profit”, “dominant purpose” and “public benefit” go further than the common law position. This is contrary to the government’s stated intention to codify the common law position.
- The Bill does not incorporate the various government department policies which have interpreted and extended on the common law definition of charity.

## **Introduction**

This Submission, on behalf of the Catholic Church in Australia, responds to the exposure draft of the Bill released by the Treasurer, the Hon Peter Costello, on 22 July 2003. A number of Catholic organisations have contributed to its preparation. They include:

- The Australian Catholic Bishops' Conference
- The Australian Conference of Leaders of Religious Institutes
- Catholic Health Australia
- Catholic Welfare Australia
- National Catholic Education Commission
- The Archdiocese of Melbourne (in its own right and on behalf of all Dioceses)
- Catholic Church Insurances Limited (in its own right and on behalf of its subsidiary and trusts)

A description of these organisations is set out at Appendix A. It may be that one or more of these organisations within the Church will wish to comment on a particular provision in the Bill in due course and in more detail than is set out below.

The submission is in 6 parts:

- A. the organisational context of the Catholic Church in Australia;
- B. the foundational theological principles from the Judeo-Christian tradition in relation to what defines a charity and charitable activity;
- C. an examination of the public policy principles which form the basis of the Bill and how they will be unworkable for charities operating to further the religious mission of the Catholic Church;
- D. specific concerns with the contents of the Bill;
- E. administrative issues; and
- F. an alternative model.

### **A. The Catholic Church in Australia – Organisational Context**

1. In Australia, the Catholic Church comprises those who are baptised, some 27% of the population, being approximately 5 million people. The Church is organised into thirty-two dioceses. A diocese usually has a defined territory and comprises all the Catholics who live there: such is the case with twenty-eight of the Australian dioceses. There are also four dioceses which cover the whole country: one each for those who belong to the Ukrainian, Maronite and Melkite rites and one for those who are serving in the Australian Defence Forces.

2. Within each diocese there are numerous organisations providing religious, educational, health, pastoral and social welfare services. Complementing this diocesan structure are other regional and national organisations, associations, and religious institutes that provide such services. Religious institutes of women and men are established throughout the country and are dedicated to fulfilling the Gospel message by worship and the conduct of practical apostolic activities in accord with their founders' particular charism. Organisations of the lay faithful also often come together to form groups under the auspices of the Church to provide services, assistance and prayer for the communities in which they live.
  
3. All who have been baptised have rights and responsibilities in the Church, whether or not they have been ordained (as bishops, priests or deacons), or taken religious vows. The *Code of Canon Law* (the fundamental legislative, as opposed to catechetical, dogmatic or moral, document of the Church) describes their activity as follows: "Since they share the Church's mission, all Christ's faithful have the right to promote and support apostolic action, by their own initiative, undertaken according to their state and condition. No initiative, however can lay claim to the title "Catholic" without the consent of the competent ecclesiastical authority".<sup>1</sup>
  
4. In Australia the Catholic Church has 1,395 parishes, 1,700 schools, 59 hospitals, 374 nursing homes and aged hostels. The Church also provides a number of home and community care based services to older people and people with disabilities. Throughout Australia, the Church provides a vast array of employment services, welfare, counselling and family support services. The Church employs over 180,000 people in various Church related activities. There are many hundreds of thousands of volunteers.
  
5. The mission of the Church is simple, to proclaim the gospel message of Jesus Christ. The infrastructure needed to live this mission is not simple. The Catholic Church is a large, complex mix of people, organisations and groups providing a vast array of interrelated ministries and services that together build up the mission of the Church. To fulfil this mission, the Church relies on the generosity of its members in terms of financial, time and prayer commitments. To sustain the infrastructure of the Church, there are various supporting institutions within the Church such as administrative, financial and insurance organisations, together with other commercial-like activities, such as bookshops, or opportunity shops, which exist to assist in proclaiming its mission, to ensure financial viability and thus support the main purpose of the Church and its activities in the world.

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<sup>1</sup> *Code of Canon Law*, (cc.215-216)

6. The *Code of Canon Law* requires Church organisations to ensure that civil law protects assets<sup>2</sup> and seek, always, to operate in a way that is consistent with prudential stewardship of resources. As a consequence the Church comprises a wide range of different legal entities: bodies corporate established by Act of Parliament, corporations sole, companies limited by guarantee, companies limited by shares, incorporated associations, trusts, funds, foundations, unincorporated associations, bodies of persons.
7. The Church is the sum of its many parts. The creation of these separate entities is really only an artificial separation. All entities created under the auspices of the Church are part of and form the Church. While each entity will have a particular focus – pastoral care, liturgy, education, health, social welfare, aged care, and financial support - each exists only in furtherance of the overall religious objectives of the Church. The objectives of some entities will mean that they fulfil the legal requirements to be deductible gift recipients, or public benevolent institutions. All fulfil the requirements to be charities since all have as their objective the advancement of religion.

## **B. Theological Principles**

8. The Judeo-Christian tradition pre-dates the *Statute of Elizabeth (The Statute of Charitable Uses, 1601 – 43 Eliz I, c 4)*, and the modern state, by millennia. The Jewish and Christian Scriptures, and their respective theological traditions, are replete with principles which have been, and remain, the touchstones of what the jurisprudential tradition calls ‘the law of charities.’
9. The theological tradition of the Church enjoins the people of God to do two things: to provide for those in need and to intercede for those in the community without a voice. The Old Testament provides the fundamental paradigm for the care of and solicitude for the less fortunate in the community. For example, the prophetic tradition is vehement in proclaiming that anyone who neglects those at the margins of society, epitomised by “the stranger, the orphan and the widow”, and who does not change laws so as to give protection and dispense justice to the lame, the weak, the poor, the destitute, and the lonely, were themselves guilty of giving offence to God.<sup>3</sup>
10. The New Testament is equally forthright. For example, the Gospel according to St Matthew records the words of Christ in what is *the* mission statement *par excellence*:

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<sup>2</sup> *Code of Canon Law*, (c. 1284)

<sup>3</sup> Generally, see Ex 22,20-21; Dt 10,17-18; 14,29; Is 1,17; 10,1-2; Jer 7,6; 22,3; Ezk 22,7.

I was hungry and you gave me food, I was thirsty and you gave me drink, I was a stranger and you made me welcome, lacking clothes and you clothed me, sick and you visited me, in prison and you came to see me. ... In truth, in so far as you neglected to do this to one of these, you neglected to do it to me. (*Mt 25,35-37 & 45*.)<sup>4</sup>

11. In the daily service of the early Church, care was taken to provide for the needs of widows (*Acts 6,1*) and, in the event that there were no relatives to provide the requisite care, the community did so (*1 Tim 5,16*). The social teaching of the Church has expanded upon these basic scriptural admonitions and precepts.<sup>5</sup>
12. A final theological principle needs to be noted. The Christian tradition holds as a central feature of the faith that each member has a responsibility to evangelise and to intercede on behalf of others. By this is meant that each member of the Church is encouraged, indeed enjoined, to share - by word and deed - the foundational precepts of the faith with others in the community.<sup>6</sup> Evangelisation and intercession are integral to the life of all Christians.
13. These principles are congruent with the *Statute of Elizabeth* and the centuries of case-law developed from it.
14. These theological principles have been set out at some length to provide the context for understanding how the Church, a complex body of interdependent individuals and organisations, operates within a framework of civil law. Members of the Church, individually and collectively, respond to local needs and establish the mechanism for charitable activity.

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<sup>4</sup> The other paradigm scriptural text is from the *Letter to James 2*, 14-26. Vv.18-19 state unequivocally, "But some may say: 'So you have faith and I have good deeds? Show me this faith of yours without deeds!' It is by my deeds that I will show you my faith."

<sup>5</sup> Generally, see the *Catechism of the Catholic Church* (1994) pars. 1928-42 regarding social justice and pars. 2419 *ff* regarding social doctrine.

<sup>6</sup> See *Mt 28,19-20*; Apostolic Exhortation of Pope Paul VI, *Evangelii Nuntiandi* ("On Evangelisation in the Modern World") (1975).

### C. Public Policy of the Bill

15. The Bill poses various problems. Some are matters of drafting *per se*; others relate to the unworkability in its practical implementation or substantive content. In its guide on *Frequently Asked Questions*, the Board of Review confirmed that the Bill “is not intended to change the tax concessions currently available to existing charities”<sup>7</sup>. However, the proposed definition of “charity” could result in certain entities, now recognised as charities, losing that status.
16. The attempt to codify centuries of common law in the Bill significantly narrows the common law interpretation and as such could restrict charitable status for many worthwhile organisations. By its restrictive nature, the Bill limits the flexibility necessary for charities to perform the vast and varied tasks expected and needed by the community. Codification as it is currently presented would stifle the objects of a charitable organisation which in turn would restrict the capacity of charitable organisations responding flexibly to emerging need. Any restriction on the ability of the Church to respond to need, or any legislative framework that makes this more difficult, such as in the Bill, may be seen as a restriction on religious liberty and religious freedom.
17. A serious defect of the Bill is that it does not take into account government department policies that have been established over time and that have extended the position of the common law. A number of entities within the Catholic Church have relied on the policies of the ATO thus far to qualify as a charity. If the substance of the policies are not incorporated into the Bill, the status of these entities may be compromised.
18. The Catholic Church continues to question the merits of defining in statute what is charitable. The Australian Catholic Church Tax Working Party *Submission to the Inquiry into the Definition of Charities and Related Organisations* (January 2001) argued that the common law approach to identifying charitable organisations is flexible enough to allow new kinds of activity and organisations to be recognised as charitable in light of changing economic and social conditions. The submission further argued that defining too closely by statute what is charitable and what is not, will lead to increased litigation and dispute, not less.<sup>8</sup>
19. The Bill demonstrates the difficulty associated with trying to codify a complex history of common law. As the Bill and its Explanatory Material demonstrate by their attempts to define this broad span of jurisprudence, it is

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<sup>7</sup> Frequently Asked Questions – question 11

<sup>8</sup> Australian Catholic Church Tax Working Party, *Submission to the Inquiry into the Definition of Charities and Related Organisations*, January 2001, page 18.

- difficult to capture the nature and scope of this activity in a coherent way. Indeed, this is why there is a solid and developed body of common law. Moreover, given the claim in the Explanatory Material, and in the Treasurer's many public statements, the object is to codify the common law. The Bill does not achieve its object.
20. The Bill also does not achieve its purpose, outlined in the Explanatory Material, "to provide clarity to entities within the charitable sector, by codifying the definition" (para 1.5). The need for interpretation of the Bill and the fact that some terms remain undefined confirms that the Bill does not meet any accepted definition of "a code". The result is a Bill that would not add clarity. If implemented, the Bill would restrict the activities of charities, and would likely also lead to challenges to decisions based on the Bill's flawed and limited definitions.
  21. As a matter of principle, to the extent that the formulation of the Bill may seek to restrict charitable status for the purposes of taxation, the Church cannot support any attempt to equate "charitable status" with "taxation status". The work of charitable organisations extends far beyond the realm of taxation.
  22. This section has identified the major legal, philosophical and public policy concerns with the proposal to introduce legislation to define the charitable sector. The following section identifies specific concerns with the contents of the Bill.

#### **D. The Bill: Specific Concerns**

##### **"Entity"**

23. The definition of "entity" in the Bill is problematic. The Catholic Church is constituted by many parts each having a specific function within the Church to work towards the Church's overall mission. The proposed definition would require each individual part of the overall Church structure to be considered an entity within its own right. The proposed definition does not recognise, nor can it embrace, the nature of the interrelatedness of these entities to the whole. The character and fundamental purpose underlying the establishment of each entity is inextricably linked to the character and underlying purpose of the Church, its functions and outreach. Put simply, these entities are best understood as aspects of the general service of the Church. It follows that in assessing the objectives of any entity, and using the example of the Church, it is necessary to see its activities in connection with the other entities of the Church and not just in isolation.

24. The definition of entity should therefore include a “religious institution” and acknowledge existing churches, such as the Catholic Church, as constituting a religious institution. The definition of religious institution should acknowledge that all canonically recognised entities established under its auspices are charitable institutions that form part of the religious institution.
25. The Bill provides that an entity may be a charity if it satisfies the core definition in section 4. However, section 4(f) of the Bill excludes a “government body” from qualifying as a charity. This exclusion creates ambiguity for the Catholic Church as the scope of this exclusion is unclear and therefore there may be organisations within the Church that may be construed as government bodies.
26. The references in the Bill to what constitutes a government body and the comments in the explanatory memorandum are inconsistent and lack clarity. For example, the explanatory memorandum states that Government funding and/or government regulation will not generally, of itself, be considered sufficient to establish that an entity is controlled by the government<sup>9</sup>. However, it also states that in certain circumstances, both government funding and government regulation may be considered to be factors that are relevant in determining the existence of government control<sup>10</sup>.
27. The ambiguity is further heightened because the interpretation of what constitutes a government body remains one aspect of the Bill which will continue to be defined by case law. The case of *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue*<sup>11</sup> demonstrates how the term government body may be interpreted widely at common law. In that case, the appellant was a non-profit company limited by guarantee and comprised of general practitioners. The object of the appellant was to improve the delivery of health care. Justice Nettle held that because the services provided by the appellant were at the expense of the Federal Government as an integrated part of a scheme of national health management, the degree of government involvement was such as to deprive the appellant of charitable status to which it might otherwise be entitled.
28. Many charities receive funding from government bodies and are highly regulated because they are involved in industries such as health, aged care, education and employment services. While the scope of this exclusion is left undefined, this exclusion may result in adverse consequences for entities of the Catholic Church.

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<sup>9</sup> Paragraph 1.19

<sup>10</sup> Paragraph 1.20

<sup>11</sup> [2003] VCS 285 (15 August 2003).

29. The Bill should clarify that an entity will only be considered a “government body” if the Board or management structure of the entity is controlled by the government. An organisation should not be construed as a government body, simply because it is funded or regulated by government.

### “Not for Profit”

30. Section 5 of the Bill provides that a ‘not for profit’ entity is one that does not carry on its activities for the purpose of profit or gain to particular persons including its owners or members and does not distribute profits or assets to particular persons including its owners or members either while it is operating or upon winding up. This definition raises the following concerns:
- it does not acknowledge the complexity of organisations such as the Church, the existence of groups and the need to move surpluses within a group;
  - it does not acknowledge that some entities are required to exist in a particular form to comply with legislative or administrative requirements; and
  - it goes further than the common law position.
31. The proposed provision does not account for charities of a significant size and complexity which often need to operate as separate entities within a group structure. In such charitable structures, it is usually the case that a surplus from one area will be used to supplement the charitable work of another area within the group so that it may meet its mission. There are also entities within the Church that distribute surpluses to its members. However, its members consist of charitable organisations within the Church. Therefore, the surpluses are used ultimately to further the mission of the Church. In such circumstances, distribution of profits *per se* should not be a disqualifying factor. Regard should be had for the status of the recipient entity and the purposes for which the surpluses are applied by the recipient entity. The explanatory memorandum confirms that “commercial activities may be undertaken provided that the profits are directed towards the charitable purpose of the entity”<sup>12</sup>.
32. Where an entity has been established under the auspices of the Catholic Church, or is owned by a part of the Catholic Church, the *Code of Canon Law* provides that any property or income is to be held and applied for Church purposes and not for the benefit of any particular person. This principle of stewardship, which has been embodied in the Catholic Church since its beginnings, ensures that such property or profits are only used to fulfil the Gospel objectives. According to law, this is the advancement of religion.

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<sup>12</sup> See paragraph 1.26 of the explanatory memorandum.

33. The Bill also fails to acknowledge that some entities are required to take on a corporate form as a result of legislative or administrative requirements. For example, entities that operate in the sector of insurance and financial services are governed by strict legislative requirements and must comply with the requirements of the relevant authority including the Australian Prudential Regulation Authority and the Australian Securities Investments Commission.
34. The definition of not-for-profit is also unworkable as it goes further than the common law by prohibiting the distribution of profits and gain to “particular persons including members and owners”. The common law only prohibits the distribution of profits and assets to “members” only.<sup>13</sup> Any codification of the not-for-profit element should be no more onerous than the common law test.
35. In summary, the definition of a ‘not-for-profit’ entity should recognise that within charitable structures, such as Churches, it is essential to enable funds to be moved within the overall group without jeopardising the charitable status of an entity where the recipient of the funds is a charity or is controlled by a charitable entity. The prohibition on distribution of profits or gain should be restricted only to non-charitable “members” to align with the common law.

#### **“Dominant Charitable Purpose”**

36. The test of dominant purpose as set out in section 6 of the Bill requires the dominant purpose of an entity to be charitable and any other purpose to be “in aid of, and ancillary or incidental to” the charitable purpose. Further, the core definition provides that an entity must not engage in any activities that do not further, or are not in aid of its dominant purpose. The definition raises the following concerns:
- it does not acknowledge the circumstances of complex entities and the need to assess the dominant purpose of an entity in connection with the purpose of the wider group;
  - it goes further than the common law as it focuses on activities rather than the purpose for establishment; and
  - the definition of “advancement” is too narrow.
37. The definition of dominant purpose does not recognise the nature of complex entities. In complex organisations such as the Catholic Church (which comprises several thousand canonically recognised entities) it is necessary to have various entities that provide the infrastructure for the Church in areas including administration, insurance, asset management, finance and

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<sup>13</sup> See for example section 50-30 and 50-40 of the *Income Tax Assessment Act 1997 (Cth)*, ATO Taxation Ruling 2003/5, ATO Ruling IT 2175, ATO Interpretative Decision 2002/496 and ATO Taxation Ruling 97/22.

- banking. The character and underlying purpose of each entity within the Church is inextricably linked to the character and underlying purpose of the Church, its functions and outreach. An examination of the purpose of particular entities in isolation may suggest that the entity does not have a charitable purpose. The overall objectives of the charitable organisation, of which this particular entity is a part, must be considered. Put simply, these entities can only be understood in the context of the wider Church rather than as distinct entities.
38. The definition also goes further than the common law as it introduces a test based on the activities of the entity rather than the purposes for which the entity was established. The Explanatory Material<sup>14</sup> provides that the dominant purpose of an entity may be ascertained by reference to matters including the constituent documents of the entity and the activities of an entity. Therefore, a key consideration in determining the dominant purpose of an entity in accordance with the proposed definition is whether the dominant purpose of an entity is to conduct activities that are charitable. This focus on activities is unworkable as it is a deviation from the existing law and is contradicted by the Treasurer's public statements and the Explanatory Material.
39. While a dominant charitable purpose has always constituted a criterion for qualifying as a charity, the prohibition on engaging in activities that do not further or are not in aid of the entity's dominant purpose is an extension of the common law. The existing law focuses primarily on the dominant purpose for which an entity *is established* rather than the dominant purpose as ascertained by the *activities conducted* by an entity. The existing law therefore recognises that an entity may satisfy the dominant purpose test where it has been established for a dominant purpose that is charitable even though the entity may not conduct activities that are directly charitable. This distinction between direct and indirect dominant purpose is crucial for various entities under the Catholic Church. For example, the dominant purpose of an insurance entity within the Catholic Church may not appear to be seemingly charitable. However, an examination of the purposes for which the entity was established may reveal that the purpose of establishment was to protect Church property and therefore advance religion by ensuring that the Church has the necessary infrastructure to live its mission.
40. In the *Report of the Inquiry into the Definitions of Charities and Related Organisations*, the Committee acknowledged that a charitable institution may have non-charitable purposes as long as those non-charitable purposes are in aid of, or ancillary or incidental to, the dominant purpose.<sup>15</sup> The

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<sup>14</sup> See paragraph 1.32 of the Explanatory Material.

<sup>15</sup> Commonwealth of Australia (2001) *Report of the Inquiry into the Definitions of Charities and Related Organisations*, p. 108 at Recommendation 3

proposed core definition of an entity is inconsistent with this principle. It does not recognise that a charitable organisation could comprise a number of incorporated (or otherwise) entities and that the dominant activities of one or more of the entities may be ancillary to the dominant purpose of the wider organisation.

41. The definition of “advancement” is also too narrow. The Bill states that a charitable entity must have a dominant charitable purpose which includes the advancement of health, education, social or community welfare, religion, culture or the natural environment or any other purpose that is beneficial to the community. “Advancement” is then defined to include protection, maintenance, support research and improvement.<sup>16</sup> This is similar to the definition of “charitable purposes” proposed by the New Zealand Second Report of the Working Party on Registration, Reporting and Monitoring of Charities released in May 2002. The meaning of ‘advancement’ in the proposed New Zealand model includes: ‘Protection, maintenance, support, research, improvement, enhancement and advocacy.’<sup>17</sup> Advocacy should be included as part of the advancement of religion because it is a fundamental aspect of the Catholic Church. The fundamental basis of the Catholic Church is to promote the mission of the Catholic faith which includes the moral beliefs of the faith. Such moral beliefs necessitate advocating changes to the law and so forth.

### “Public Benefit Test”

42. The public benefit test contained in section 7 of the Bill is three fold and cumulative. Section 7 states that an entity has a purpose for the public benefit if it:
- is aimed at achieving a universal or common good;
  - has practical utility; and
  - is directed to the benefit of the general community or to a sufficient section of the general community.
43. The following concerns are raised by this test:
- it does not recognise the common law presumption that an entity falling under the first three heads of charity are presumed to be for the public benefit;
  - The Bill and the explanatory memorandum provide insufficient explanation as to what is meant by all three parts of the public benefit test; and
  - the test should also be satisfied where there is an indirect public benefit.

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<sup>16</sup> See Clause 10, *Charities Bill 2003 Exposure Draft*.

<sup>17</sup> Second Report by the Working Party on Registration, Reporting and Monitoring of Charities. (<http://www.treasury.govt.nz/charities/2ndreport/>)

44. In the well known case of *Income Tax Special Purposes Commissioners v Pemsel [1891] AC 531*, Lord Macnaghten identified four heads of charity comprising the relief of poverty, the advancement of education, the advancement of religion and other purposes beneficial to the community. These four heads of charity have been referred to by courts throughout history to determine charitable purposes. It has been recognised by the common law and government policies that entities with purposes falling under the first three heads of charity are presumed to be for the public benefit. Therefore entities that are established for the purpose of the advancement of religion should be presumed to be for public benefit.
45. The proposed test of public benefit in the Bill reverses the onus by requiring all entities including those established for the advancement of religion to prove that they satisfy all elements of the public benefit test. This would impose an additional administrative burden for entities of the Catholic Church especially as the public benefit test would be satisfied in virtually all cases.
46. Also, the Bill does not define what is meant by “sufficient section” and “numerically negligible” and how such a test would be applied. Where services such as schools may be established to meet the needs of people of a particular faith, there is a concern that the size of the faith community in comparison to the rest of the community could be used to discriminate against access to charitable status.
47. The test of public benefit should also be capable of being satisfied where the purpose of an entity confers an indirect public benefit to the community. Some entities of the Catholic Church have purposes which advance religion through protection, maintenance or research. For example, the protection of the assets of the Church may not confer a direct public benefit but confers an indirect public benefit as the general community is able to benefit from the use of the infrastructure.

### **“Disqualifying Purpose”**

48. Section 8 of the Bill deems the conduct of unlawful activities as a disqualifying purpose. Further, having a purpose that advocates a political party or cause, supporting a candidate for political office or attempting to change the law or government policy are disqualifying purposes. The scope of these disqualifying purposes are not adequately defined and therefore create ambiguity and uncertainty for charitable entities.
49. In relation to the conduct of unlawful activities, the scope of the term “unlawful activities” is unclear. A breach of strict liability offences such as Occupation Health and Safety or road traffic laws could be strictly construed as the conduct of unlawful activities. It would be unreasonable for this sort of unlawful activity to constitute a disqualifying purpose.

50. In relation to advocating a political party or cause, the word ‘cause’ is too vague and would render the Bill unworkable. Almost any form of advocacy could be regarded as a political cause. Yet, it is fundamental to the very nature of a charitable body that it will seek to advocate its moral beliefs and to represent the poor, disadvantaged and those who would not otherwise have a voice in public debate. This sort of advocacy should not be a disqualifying purpose and indeed should be included in the definition of “advancement”. Any law which prohibits the right of advocacy may be construed as a contravention of the implied freedom of communication contained in the Constitution. The principles extrapolated from case law indicate that there is an implied right to make communications in relation to public affairs and political discussion and to make well-founded and relevant criticism of the government<sup>18</sup>.
51. The Bill goes much further than the *Report of the Inquiry into the Definition of Charities and Related Organisation* which stated that an entity could be charitable if it had a non-party political purpose if that purpose furthered or was in aid of the charitable purpose.<sup>19</sup>
52. Further, the Bill needs to distinguish between, on the one hand, organisations that directly advocate or support a political party and, on the other, those organisations that support a specific policy position of a political party or take a policy position that is then subsequently supported by a political party. In the area of public policy, it is common for charitable organisations to develop and recommend policy responses which are adopted by political parties or conversely charitable organisations may publicly support initiatives or policy proposals put forward by political parties. These situations do not constitute direct support or advocacy for the political party but support for a policy position. The current drafting of the Bill may disadvantage charitable organisations that support policy responses which may appear to coincide with the policy positions of a particular political party.
53. It is also foreseeable that some Church entities or dignitaries may from time to time publish letters or make statements advocating or opposing certain laws in accordance with the Catholic faith. Some Church entities also make submissions or lobby for changes in government policies to benefit that entity. The Bill should make it clear that this disqualifying purpose is not intended to apply to such activities. Any statutory framework would require the above aspects to be clarified.

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<sup>18</sup> *Nationwide News Pty Limited and Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth of Australia* (1992) 177 CLR 106.

<sup>19</sup> Commonwealth of Australia (2001) *Report of the Inquiry into the Definitions of Charities and Related Organisation*, page 229.

**“Serious Offence”**

54. The Bill states that an entity will not qualify as a charity if it engages in or has engaged in conduct (or an omission to engage in conduct) that constitutes a serious offence. A serious offence is defined as an indictable offence.
55. The definition of serious offence does not require the formality of a conviction but only an administrator’s determination that the conduct would constitute an offence. Furthermore, there does not appear to be any prospect of re-establishing charitable status if one ‘has ever’ engaged in such conduct. Also, the fraudulent or other illegal actions of an employee may subject the charitable organisation to penalties even where the organisation had put in place measures to guard against the offence occurring. This is unworkable and provides no certainty of application. The penalty appears unjustifiably harsh as an organisation would be subject to two penalties – the legal penalty itself and loss of charitable tax status. The Bill and its accompanying materials are also deficient with respect to whether a reformed offender would compromise the charitable status of an entity.

**“Altruism”**

56. The Catholic Church does not consider it necessary to include altruism as an additional element to the core definition. The proposed elements of the core definition operate cumulatively to ensure that entities that are not for the public benefit do not qualify as charities. The motivation for the charitable purpose or activity is not always easy to discern. The inclusion of altruism would produce no additional benefit.

**“Competitive Neutrality”**

57. The Catholic Church is concerned that the introduction of the Bill could be used to further extend taxation policy into the realm of subjecting charities to competitive neutrality regimes. While this issue has not been included in the Terms of Reference, the Church considers it important to reiterate our concerns about competitive neutrality and our strong view that any legislation in this area should not be used as a means of introducing competitive neutrality tests for the charitable sector.
58. The Catholic Church’s Submission to the Inquiry into the Definition of Charities and Related Organisations stated:

“The argument for similar tax treatment with for profit providers of human services is inherently flawed because it overlooks the advantages that for profit providers already have over non-profit

providers in the fundamental area of the ability to attract capital resources. For profit providers attract capital investment precisely because they can offer investors a return on that investment. Non-profit providers do not offer any such return to contributors. The differential tax treatment for non-profits can be seen as a means of levelling the playing field already tipped in favour of for profits and so arguments for removing the special status of charitable bodies turn out to be arguments for maintaining the competitive advantages of for profit providers.”<sup>20</sup>

59. There has been a general public policy trend to encourage a mixed economy in the delivery of human services including for profit and not for profit organisations. One of the assumptions underpinning this policy is that not for profit organisations will venture into aspects of the market that provide less returns on investment and cater for areas of market failure. They are prepared to undertake to deliver services that return minimal surplus or are loss making. This is consistent with the mission of these charitable organisations and is part of their contribution to the common good. As such, it justifies tax status concessions since it bolsters the social fabric and delivers tangible community benefits.

60. The argument that competitive neutrality principles should not be used to reduce the tax benefits to charitable organisations was previously made by the then Industry Commission which concluded that:

“...the income tax exemption does not compromise competitive neutrality between organisations. All organisations which, regardless of their taxation status, aim to maximise their surplus (profit) are unaffected in their business decisions by their tax or tax-exempt status.”<sup>21</sup>

61. While arguing that the issue of competitive neutrality was also outside the scope of defining charitable organisations, the Committee oversighting the Inquiry into the Definitions of Charities and Related Organisations, nevertheless found that:

“It would also be inappropriate for the definition of a charity to change because other sectors of society engage in activities previously the domain of charities. The entry of for profit providers into areas previously the domain of charities should not deny the charities their status if they retain the characteristics of being not for profit and with

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<sup>20</sup> Australian Catholic Church Tax Working Party, *Submission to the Inquiry into the Definition of Charities and Related Organisations*, January 2001, p17.

<sup>21</sup> Industry Commission (1995) *Charitable Organisations in Australia*, Report No.45, AGPS. Melbourne, p K5.

a dominant purpose that is charitable, altruistic and for the public benefit. Similarly, if charities engage in the provision of services in a commercial manner at the behest of government it would be unfair to deprive them of their charitable status.”<sup>22</sup>

62. The Catholic Church supports the arguments that were made in the Committee’s deliberations. Any attempt to introduce competitive neutrality into the charitable sector is inherently unfair.

**E. Administration of the Bill**

63. For the sake of completeness, important matters in relation to the workings of the Bill are noted here for consideration by the Board of Taxation.
64. On 13 August 2003, Senator Helen Coonan announced that a second consequential document would be tabled which would deal with the implementation and administration of the Bill. The Board of Taxation has indicated that it does not wish to receive comments on the administration of the Bill during the consultative process. However, the substantive content of the Bill and the administration of the Bill are inextricably linked and that the administration of the Bill also impacts upon workability. To legislate in relation to the technical administrative issues in isolation creates uncertainty as it requires entities to anticipate how the Bill will be implemented. If the Bill is in fact implemented in a manner other than anticipated, the Bill may prove to be unworkable for those entities. To legislate on the administration of the Bill in isolation may therefore negate the object and benefits of the consultation process.
65. Further, the consequential Bill may impose administrative burden that may be significant, time-consuming and costly. Therefore, charities should be provided with the opportunity to comment on how the administrative requirements will impact on them. This is especially relevant to religious institutions such as the Catholic Church that are complex entities comprised of many parts. It would be detrimental to the Church if the consequential bill required every form of entity constituting the Church to meet the core definition. Both legally and administratively, the Church must be recognised as the umbrella entity representing all entities created under its auspices.
66. Finally, neither the Bill, nor its accompanying materials, refers to or addresses the critical question of ‘who will decide who is a charity’ under the proposed legislation. Such a glaring gap adds to the unworkability of the Bill. An equally significant flaw in the Bill and its materials is the failure to address

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<sup>22</sup> Commonwealth of Australia (2001) *Report of the Inquiry into the Definitions of Charities and Related Organisation*, page 229.

ATO policies and rulings pursuant to which certain entities have been recognised as charities. It is essential that these rulings and policies be incorporated into the Bill. The fact that they have not is another indication that the Bill is not a Code and as it stands it is unworkable.

**F. An alternative model**

67. The following proposal offers a more expeditious solution which would not inhibit religious freedom and flexibility within the overall charitable sector whilst still satisfying the Government's requirements to have some oversight of the workings of charitable organisations in Australia and in particular to ensure that they are subject to the appropriate tax status.

Such a system could involve:

- The introduction of minimalist legislation to supplement the common law definition of charity to include child care services, non-discriminatory self-help groups and closed and contemplative religious orders.
- The other more detailed prescriptions in the Bill would not be necessary and the policy intent is well covered by the common law.
- The establishment of a public register which identifies charitable organisations and their specific tax status including whether they are Public Benevolent Institutions (PBI), or have Deductible Gift Recipient (DGR) status or other taxation entitlements.'
- Within this system there may also be a system of self identification for larger charitable organisations such as Churches and others that are in effect a group of entities that form the Charity. Here the accent would be on the over-arching religious or charitable purpose of the `parent body. For example the Catholic Church could be registered on the public register and a central body within the Church would be responsible for monitoring and managing the various entities that comprise the Church. By arrangements with the ATO the identification of an entity as part of the Charity would automatically confer ITEC status.
- Entitlement to endorsement as a DGR or PBI would be determined by separate application to the ATO.

Such a system has several advantages:

- It would minimise the litigation and disputes that would be generated by the Bill as the Bill would simply expand on the categories of charities.

- There would be greater public visibility and therefore accountability of the charitable sector through the public register;
- The Government would not have to commit excessive resources to monitoring each and every entity that makes up an overall charitable entity such as in the case of larger Churches;
- Charitable organisations would retain flexibility to meet changing needs in the community.

The Catholic Church contends that there is an alternative for the Government to consider if its purpose is to bring greater transparency to and clarity for the charitable sector.

## **Description of Catholic Organisations contributing to this Submission**

### **The Australian Catholic Bishops' Conference**

The Australian Catholic Bishops' Conference is an unincorporated association. It is constituted, according to the *Code of Canon Law* (c.447), as a permanent institution with defined functions of teaching (c.753), a role in the framing of Church legislation affecting its territory, and a general responsibility for facilitating co-operative action by its members at a national level. Its membership comprises all forty-two archbishops and bishops exercising office in each of the thirty-two dioceses in Australia.

### **The Australian Conference of Leaders of Religious Institutes**

The Australian Conference of Leaders of Religious Institutes in Australia (ACLRI) is the formal association, established by the authority of the Holy See. There are over 200 Leaders of religious institutes in Australia with over 8000 vowed religious women and men in this country who are involved in a variety of ministries. Whether in health, education or welfare, or in any other area of ministry, the object of our religious enterprises is to advance religion.

### **Catholic Health Australia**

Catholic Health Australia (CHA) is the largest non-government provider grouping of health, community and aged care services in Australia, nationally representing Catholic health care sponsors, systems, facilities, and related organisations and services. The Catholic health ministry is broad, encompassing many aspects of human services. Services cover aged care, disability services, family services, paediatric, children and youth services, mental health services, palliative care, alcohol and drug services, veterans' health, primary care, acute care, non acute care, step down transitional care, rehabilitation, diagnostics, preventative public health, medical and bioethics research institutes.

CHA represents 59 hospitals (39 privately funded and 20 publicly funded) including 8 dedicated hospices and palliative care services. Within the aged and community care sector, CHA represents organisations that provide 17,000 residential aged care beds; more than 5300 independent living and retirement units; 4417 community aged care packages, 4729 home and community care services and 485 aged care facilities and services, of which 157 are based in rural and regional Australia.

### **Catholic Welfare Australia**

Catholic Welfare Australia is the peak body representing Catholic welfare agencies. It is a national federation of Catholic social service organisations that operate in local communities and at a diocesan level, including Centacare agencies nationwide. Catholic Welfare Australia is an organisation of the Australian Catholic Bishops' Conference and is responsible to the Catholic Bishops through a Board appointed by

the Conference. The network employs over 5500 people and provides direct assistance and support to many thousands of people each year. It spends over \$200m annually in the service of those in need. Catholic Welfare Australia seeks to answer the challenge of social justice in the Gospels, and to promote the ministry of Catholic social welfare as part of the core mission of the Church to be a sign of God's kingdom in the world.

### **National Catholic Education Commission (NCEC)**

The NCEC is the official body appointed by and responsible to the Australian Catholic Bishops' Conference for developing, enunciating and acting upon policy at the national level for the Church's work in education. NCEC represents some 1,700 Catholic schools in Australia with over 660,400 students attending these schools. Catholic schools employ over 55,000 staff.

### **Catholic Archdiocese of Melbourne (on behalf of all Dioceses)**

The Archdiocese of Melbourne is numerically the largest Archdiocese in Australia. It has a population of 1,026,878 Catholics in 232 parishes. It operates 331 schools as well as providing the operational environment for numerous religious institutes and organisations that provide religious, social welfare and educational services to the Catholic population and the community generally.

### **Catholic Church Insurances Limited(CCI)**

CCI is a company limited by shares. CCI was established in 1911 in response to a need to provide insurance for properties owned by the Catholic Church. CCI now provides a range of insurance products to the Catholic Church and ancillary thereto and in a minor way to the broader Catholic community.

While the corporate structure of CCI necessitates that all surpluses are returned to the members of CCI, CCI's current Constitution restricts membership to religious associations, funds or organisations associated with or under the control of the Catholic Church. Therefore, while the activities of CCI may in a particular financial year generate profit (by way of return on the share capital) for its members, all profits are directed to the various organs of the Catholic Church, thereby promoting and furthering the charitable mission and objects of the Catholic Church. CCI's wholly-owned subsidiary and trusts have also been established for the purpose of furthering the mission of the Church.

CCI refers the Board of Taxation to its earlier submission of 31 January 2003 for further information.