

22 June 2010

Mr John Hawkins
Secretary, Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Hawkins

INQUIRY - TAX LAWS AMENDMENT (PUBLIC BENEFIT TEST) BILL 2010

PilchConnect welcomes the opportunity to comment on the proposed *Tax Laws Amendment (Public Benefit Test) Bill 2010 (the draft Bill)* and its proposal to insert a public benefit test into Division 50 of the *Income Tax Assessment Act 1997 (the Act)*. Thank you for granting us a short extension for our submission as it enabled us to talk to a visiting colleague from the Charity Commission of England and Wales about these issues.

About PilchConnect

PilchConnect is a specialist community legal service that provides support for not-for-profit organisations (**NFPs**), and is one of six services operated by the Public Interest Law Clearing House (Vic) Inc.¹ The PilchConnect service includes free and low cost legal information, training, and legal advice for NFPs, and is able to match eligible Victorian public interest NFPs with PILCH member law firms to receive free legal assistance on complex legal issues. Our service is unique within Australia.

Our submission

1. An inappropriate and unnecessary response to potential abuse

When tabling the draft Bill in the Senate on 13 May 2010, Senator Xenophon made reference to the 'victims of the Church of Scientology'.² The Explanatory Memorandum to the draft Bill further elaborates on this point, stating:

This Bill follows allegations from former members of the Church of Scientology about coerced abortions, false imprisonment, breaches of Occupational Health and Safety laws, stalking, harassment and extortion, to name but a few.

¹ See www.pilch.org.au/about/

² Senate Hansard 13 May 2010, p.7

PilchConnect submits that nature of the above allegations is such that they are more appropriately addressed by law enforcement agencies, rather than through proposed changes to the *Income Tax Assessment Act 1997* which, as explained below, could have much broader adverse consequences for many charitable organisations.

While the High Court has previously determined that the Church of Scientology is a 'religion'³, if new evidence is available about illegal activities it may be possible to overturn the Church's current charitable status without legislative amendment. Although under Australian common law the public benefit is 'presumed' for those falling under the relief of poverty, advancement of education and advancement of religion heads of charity, it is possible for the contrary to be proved (namely, for the presumption to be overcome).⁴ In this regard, we refer to the submission of Dr Matthew Turnour where he explains in some detail that the common law definition of charity already has the ability to exclude organisations pursuing purposes that are illegal or against public policy.⁵

The presumption of public benefit may also be overcome if there is new evidence that the nature of the Church of Scientology's practices and its accessibility to the public, are such that any benefits can be determined to be of a 'personal' as opposed to a 'public' nature. In this regard we note that the Church of Scientology was denied charitable status in the UK in 1999, seven years before a legislative public benefit test was introduced in that jurisdiction. In forming this view, the Charity Commission of England and Wales concluded that because of the private conduct and nature of the Church of Scientology's practices, together with their general lack of accessibility, meant that the benefits were of a personal as opposed to a public nature and therefore not within the common law meaning of charitable.⁶ We understand that should this particular determination need to be reconsidered, the Commission does not believe it would need to rely on the new statutory requirement to prove public benefit.

2. Need for package of reforms rather than piecemeal, reactive approach

PilchConnect has made detailed submissions to the multiple inquiries that have considered the issue of what organisations should receive concessional taxation treatment, and what the appropriate body is to determine status for this and other purposes. In particular we refer the Committee to our following submissions on these points:

- (i) 2008 Senate Inquiry into Disclosure Regimes for Charities and NFP Organisations, available at www.pilch.org.au/pastsubmissions/#5.
- (ii) 2008–2010 Australia's Future Tax System Review Panel (Henry Review), available at www.pilch.org.au/pastsubmissions/#4.
- (iii) 2009–2010 Productivity Commission Report into the Contribution of the NFP Sector, available at www.pilch.org.au/submissions/#3.

³ *Church of New Faith v Commissioner of Pay-Roll Tax* (1983) 154 CLR 120

⁴ See p. 1, Submission no. 47 to this Inquiry by the Not-for-Profit Project, University of Melbourne

⁵ See p.7, Submission no. 1 to this Inquiry by Dr Matthew Turnour, and ATO Ruling TR2005/21

⁶ See Charity Commission of England and Wales decision of the Commissioners: <http://www.charity-commission.gov.uk/library/start/cosfulldoc.pdf>

We assume that the Committee will be fully apprised of the seminal 2001 Charity Definition Inquiry Report⁷ where these issues were considered in a holistic way, with considerable input from the NFP sector and consideration of overseas models.

In short, PilchConnect again recommends that:

- any taxation reform should be underpinned by a rational policy basis for charity and NFP taxation exemptions and other incentives;
- this underpinning was carefully considered in the 2001 Charity Definition Inquiry and we endorse the recommendations arising from that Inquiry's report;
- the current Senate Inquiry, in line with the 2008 Senate Disclosure Regimes for Charities and Not-for-Profit Organisations, endorses the recommendations of 2001 Charity Definition Inquiry; and
- implementation of these reforms to legislative treatment of charities occurs after, or in conjunction with the establishment of a new, independent, specialist NFP regulator.

Motivation for the draft Bill highlights a reactionary approach that does not adequately address the broader need for reform of the regulatory framework for the NFP sector. In 2010 alone, there have been two major Government reviews that have recommended the adoption a statutory definition of charity (in line with the 2001 Charity Definition Inquiry), in conjunction with the establishment of an independent regulatory body with sector-wide responsibilities.⁸

It is our view that the draft Bill would serve as yet more piecemeal reform that would do more harm than good to an already complex and unfit regulatory framework for Australia's economically and social significant NFP sector.⁹

3. Adverse consequences if the draft Bill, in current form, is enacted

We support the submission by the University of Melbourne's NFP Project¹⁰ (we sit on their Consultative Committee). In particular:

- in contrast to the comprehensive regulatory scheme in the UK administered by specialist regulators that issue extensive guidance material, there is no assistance in the draft Bill for the large number of charitable organisations that would be affected by the proposal;
- a test of 'public benefit' for religious organisations is likely to prove problematic (and divisive) in the context of a diverse community sharing different religious beliefs;
- the draft Bill may not achieve its intended effect; and
- the scope of the draft Bill is far-reaching and will affect many organisations beyond the Church of Scientology, many of which may face unintentionally adverse consequences.

⁷ See <http://www.cdi.gov.au/html/report.htm>

⁸ See Productivity Commission Report *Contribution of the NFP Sector* (2010) at recommendations 6.5 and 7.1, and Henry Review's *Report on Australia's Future Tax System* (2010) at recommendation 41.

⁹ In economic terms alone, the NFP sector contributes a reported \$43 billion to GDP in 2006-07 (ABS No. 8106.0)

¹⁰ See p. 1, Submission no. 47 to this Inquiry by Not-for-Profit Project, University of Melbourne

We submit that the draft Bill will impose a significant burden on the Australian Taxation Office (ATO) which will presumably be required to apply the public benefit test. This will have resource and funding implications that are not addressed in the draft Bill's supporting material, and is likely to lead to resources being diverted from worthwhile initiatives such as plain language resources for the NFP sector.

We would argue that the money and resources that it would take the ATO to undertake the required review of existing organisations would be much better spent on reforms that will support and assist greater transparency and accountability in the sector (for example, a publicly accessible register such as that maintained by the Charity Commission for England and Wales).

PilchConnect submits that it would be harmful to introduce a 'public benefit test' for charitable status under the Act without first establishing an independent, specialist regulator to apply, develop and provide guidance on the development of legislative approaches to defining charity in Australia.

Please let us know if we can provide further assistance to the Committee.

Yours sincerely

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