Submission to:

Senate Inquiry into Charities and Public Benefit

By:
Paul Paxton-Hall

Contact
Paul Paxton-Hall
Director
Level 10, 15 Adelaide Street, Brisbane Qld 4000
Telephone: 07 3007 9250
Email: paul.paxton-hall@foxthomas.com.au

Senate inquiry into charities & public benefit

Tax Laws Amendment (Public Benefit Test) Bill 2010

Introduction

1. As the explanatory memorandum (**EM**) to Tax Laws Amendment (Public Benefit Test) Bill 2010 (**Bill**) points out, the Bill is a response to the "*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*".

2. That the Bill should be a response to criminal activities or other breaches of law is, in my submission, an incorrect though laudable policy response. This is because the power already exists for the ATO to deny the church tax exempt status – the very relief that the Bill is intended to deliver. In my submission herefore, the Bill is unnecessary.

Why the Bill is flawed

3. To my mind the Bill is flawed for these reasons:

   (1) **The ATO already has requisite power:** all taxpayers are required to self assess their income tax liability or, in the case of tax concession charities or religious institutions, their continuing entitlement to tax exemption under Division 50 of the *Tax Act*. This is an annual obligation. Merely because a charity has been endorsed as a tax concession charity under Division 50 or, in the case of a religious institution, is exempt under item 1.2 of section 50-50, does not mean the institution has an ongoing entitlement to tax exemption. An organisation's activities may change over time such that its activities are no longer consistent with its purposes (charitable or religious). In that case the ATO may withdraw the organisation's tax exempt status.

   (2) **Using a sledgehammer to crack a nut:** a charitable purpose must be for the benefit of the community[1] with the exception of the charitable purpose, relief of poverty, which does not require a test of public benefit. To impose a statutory public benefit test is likely therefore to amount to a significant qualification of the common law definition of charity applied in Australia. The potential for change in the approach to charity definition requires considered debate. This is particularly so when one considers the extent of public debate in the Report of the Inquiry into the Definition of Charities and Related Organisations conducted in 2001. Whilst the Bill makes reference to the adoption of a public benefit test in the UK in 2006, the Bill also points out that it is the UK Charity Commission that is responsible for the administration of the public benefit test in the UK – something we do not have in Australia despite recommendations made to that effect in recent times in the Productivity Commission Research Report (January 2010) and the Henry review.

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[1] TR2005/21 at paragraph 50

(3) **The Bill itself:** the Bill allows for the determination of the detailed criteria for a public benefit test to be specified by regulation. A matter of such significance for charitable institutions or religious institutions should not be the subject of regulation. If at all, the specific requirements for a public benefit test should be enshrined in the Act after considered debate and not-for-profit sector consultation.

The existing law

4. The extent of "charity" was considered recently by the High Court in *The Commissioner of Taxation –v- Word Investments Ltd* [2] an excellent case note of *Word* by Ian Murray analyses the case in some detail[3].

5. Central to *Word* was confirmation that Division 50 of the *Tax Act* requires that 2 positive tests must be met; namely:

   (1) the entity's purpose must be charitable in the technical legal sense; and

   (2) the entity (unless is it for the relief of poverty) must be for the public benefit. This means that the entity must bestow an actual benefit and must do so on a section of the public, rather than a private class of individuals.

6. The Court in *Word* affirmed an earlier High Court case [4] that the determination of charitable status is a flexible one and to be applied in a way that keeps pace with changing social needs.

7. In assessing an institution's entitlement to charitable status "it is necessary to examine the objects, and the purported effectuation of those objects in the activities, of the institution in question. In examining the objects, it is necessary to see whether its main or predominant or dominant objects, as distinct from its concomitant or incidental or ancillary objects, are charitable."[5]

8. Word made it clear that powers of an organisation "do not authorise conduct which does not further the charitable purposes…."[6]

9. With those comments in mind, it is necessary to bear in mind that:

   (1) a purpose contrary to public policy; and

   (2) a lawful purpose, carried out by unlawful means,

   is not charitable[7]. Whilst TR 2005/21 paragraph 101 makes it plain that "*that the mere fact that an organisation or its employee has breached a law would not, in itself, show that the organisation has a non-charitable purpose. Instances of illegality in relation to occupational health and safety, employee entitlements and regulatory requirements would be unlikely to point towards a non-charitable purpose*". However, the ruling goes on to make it clear that a planned and co-ordinated campaign of violence, for example, would indicate activities that went against public policy thus denying the organisation of charitable status.

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[2] 2008 [HCA55]
[3] 2009 [Sydney Law Review 12]
[4] *Central Bayside General Practice Association Ltd -v- Commissioner of State Revenue 2006* [HCA43]
[5] At paragraph 17 of the *Word* decision
[6] At paragraph 22 of the *Word* decision
[7] TR2005/21 at paragraph 100

10. For these reasons, I think the current law allows the ATO to effect the very response that the Bill envisages; namely, the denial of tax exempt status where a religious institution's activities go against public policy.

The public "benefit" test

11. Charity law in Australia requires a public benefit test for purposes other than the relief of poverty. In the case of the advancement of education and the advancement of religion, a public benefit test is easily met if education is provided and religion is advanced (particularly with the provisions of the *Extension of Charitable Purpose Act 2004*).

12. A proposal to statutorily oblige a charity or religious institution to meet a public benefit test is to expand on the concept of charity as the common law has known it for hundreds of years. It allows for the politicisation of "public benefit" and the treatment of a range of charities generally. This has proven to be the case in the UK since 2006 with views about the previous UK government politicising the entitlement of wealthy private schools to tax concessions. In other words, whilst the Bill may well have traction as a means of dealing with the Church of Scientology, it has far reaching implications for charities more generally.

Summary

13. Not only is the Bill unnecessary to deal with the mischief that it is intended to address but it has significant and far reaching implications for the charitable sector. Whilst it may well be appropriate for Australia to consider a detailed review of its approach to charity status and, with it, income tax exemption and concerns around competitive neutrality arguments, that approach requires considerable public debate, discussion and consultation with key interest groups. A change of this magnitude is not appropriately dealt with by the Bill under review.

14. The Bill should not be passed in my submission.

Paul Paxton-Hall
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