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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

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CHARITIES BILL 2013  
CHARITIES (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL  
PROVISIONS) BILL 2013

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EXPLANATORY MEMORANDUM

(Circulated by the authority of the  
Deputy Prime Minister and Treasurer, the Hon Wayne Swan MP)



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## ***Table of contents***

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Glossary .....	1
General outline and financial impact.....	3
Chapter 1      Definition of charity.....	5
Chapter 2      Transitional and consequential amendments .....	33
Chapter 3      Statement of Compatibility with Human Rights .....	43
Index.....	49



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## ***Glossary***

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The following abbreviations and acronyms are used throughout this combined explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACNC	Australian Charities and Not-for-profits Commission
ACNC Act	<i>Australian Charities and Not-for-profits Commission Act 2012</i>
Charities Definition Inquiry report	<i>2001 Report of the Inquiry into the Definition of Charities and Related Organisations</i>
Consequential Amendments Bill	Charities (Consequential Amendments and Transitional Provisions) Bill 2013
ITAA 1997	<i>Income Tax Assessment Act 1997</i>



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## ***General outline and financial impact***

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### **Definition of charity**

The Charities Bill 2013 and the Charities (Consequential Amendments and Transitional Provisions) Bill 2013 introduce a definition of charity and charitable purpose for the purposes of all Commonwealth legislation.

The Government announced in the 2011-12 Budget that it would introduce a statutory definition of charity based on the 2001 *Report of the Inquiry into the Definition of Charity and Related Organisations*, also taking into account later judicial decisions.

The meaning of charity and charitable purpose has not previously been comprehensively defined in statute for the purposes of Commonwealth law. The meaning has been largely determined based on over 400 years of common law. The statutory definition generally preserves the common law principles by introducing a statutory framework based on those principles but incorporating minor modifications to modernise and provide greater clarity and certainty about the meaning of charity and charitable purpose.

***Date of effect:*** The definition applies from 1 January 2014.

***Proposal announced:*** The introduction of a statutory definition of charity was announced by the then Assistant Treasurer and the then Minister for Human Services and Social Inclusion's Joint Media Release No. 077 of 10 May 2011. The Assistant Treasurer announced the start date of 1 January 2014 in Media Release No. 045 of 8 April 2013.

***Financial impact:*** Unquantifiable but small revenue cost impact.

***Human rights implications:*** This Bill does not raise any human rights issues. See Statement of Compatibility with Human Rights — Chapter 3.

***Compliance cost impact:*** The introduction of a statutory definition of charity is not expected to have any significant compliance cost impacts, apart from some minor transitional costs for some entities which may need to revise their registration subtype with the Australian Charities and Not-for-profits Commission because the Bill lists more specific categories of charitable purposes. Entities will have 18 months to revise their registrations. The Bill should reduce compliance costs over the medium to long term.





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# Chapter 1

## Definition of charity

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### Outline of chapter

1.1 This Chapter explains the context of the statutory definition of charity, the elements of the definition, charitable purposes, and disqualifying purposes.

1.2 References in this Chapter to the ‘Bill’ are references to the Charities Bill 2013 unless otherwise stated.

### Context of reform

1.3 The meaning of charity and charitable purpose has not been comprehensively defined for the purposes of Commonwealth law; rather the meaning has largely been determined from the common law.

1.4 The *Extension of Charitable Purpose Act 2004* extended the common law meaning for Commonwealth purposes to include child care, self-help bodies and closed or contemplative religious orders.

1.5 The common law meaning has developed over 400 years, largely based on the Preamble to the Statute of Charitable Uses (known as the Statute of Elizabeth), enacted by the English Parliament in 1601. Charitable purposes are commonly categorised, following the terminology of the *Commissioners for Special Purposes of Income Tax v Pemsel* [1891-1894] All ER Rep 28 (Pemsel case), as the four ‘heads of charity’:

- the relief of poverty;
- the advancement of education;
- the advancement of religion; and
- other purposes beneficial to the community.

1.6 For a purpose to be charitable within the technical legal meaning of charitable under the common law (which overlaps but does not fully coincide with the popular or dictionary meaning), the purpose must be ‘within the spirit and intendment’ of the Statute of Elizabeth, and for the public benefit.

1.7 The development of the definition of charity and charitable purpose through case law based on the spirit and intendment of the Statute of Elizabeth has resulted in charity law that is in some areas unclear, inconsistent, or does not adequately address matters relevant to the contemporary Australian charity sector.

1.8 A statutory definition is intended to provide greater clarity and certainty for charities, the public and regulators in determining whether an entity is charitable and consequently reduce the need for costly litigation.

1.9 The statutory definition provides a framework for considering charity and charitable purposes. However, the definition retains the flexibility inherent in the common law that enables the courts, as well as Parliament, to continue to develop and extend the definition to other charitable purposes beneficial and relevant to contemporary Australia within the statutory framework. This will ensure that the definition remains appropriate and reflects modern society and community needs as they evolve.

1.10 The statutory definition applies to all Commonwealth legislation. It may provide a common framework which States and Territories may adopt over time, thereby further reducing complexity and compliance costs for Australian charities.

1.11 The Commissioner of the national regulator for the not-for-profit sector, the Australian Charities and Not-for-profits Commission (ACNC), has predominant responsibility for administering this definition through the *Australian Charities and Not-for-profits Commission Act 2012*.

1.12 The Bill is informed by the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations* (Charities Definition Inquiry report), which expressed principles underlying charity and charitable purpose, and the 2003 Board of Taxation's *Consultation on the Definition of a Charity: A Report to the Treasurer*. It also takes into account subsequent judicial decisions.

1.13 Significant court decisions since the Charities Definition Inquiry report which have developed the meaning of charity include:

- *Aid/Watch Incorporated v Federal Commissioner of Taxation*, which extended the circumstances in which a charity may advance public debate;
- *Federal Commissioner of Taxation v Word Investments Ltd*, which found that activities undertaken by an entity need not be intrinsically charitable for the entity to be a charity so long as they are directed to aiding or furthering the charitable purpose; and
- *Central Bayside General Practice Association Ltd v Commissioner of State Revenue*, which developed the meaning of government control of an entity and clarified boundaries to the definition.

1.14 In addition to the Charities Definition Inquiry report, a range of later reports and inquiries have recommended a statutory definition. These include:

- the 2010 *Australia's Future Tax System Review*;
- the Productivity Commission's 2010 Research Report *Contribution of the Not-for-Profit Sector*;
- the Senate Economics Legislation Committee *Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010*; and
- the 2011 *Final Report of the Scoping Study for a National Not-for-profit Regulator*.

1.15 The Government has conducted public consultation on a discussion paper, *A Definition of Charity*, and on an exposure draft of this Bill, and has consulted extensively with the not-for-profit sector in the development of the definition.

## Summary of new law

1.16 The definition of charity and charitable purposes has been generally based on existing common law principles with minor modifications to modernise and clarify the common law. To be a charity, an entity must be not-for-profit and have only charitable purposes (other than incidental or ancillary purposes that further or aid the charitable purpose) that are for the public benefit.

1.17 The categories of charitable purposes described in the Bill broadly follow the categories described in the Charities Inquiry report in grouping purposes found by the courts to be charitable. In addition, the Bill incorporates purposes specified in the *Extension of Charitable Purpose Act 2004*, makes further minor extensions to charitable purposes, and modernises the language and categories.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
<b>Definition</b>	
The Bill defines charity and charitable purpose.	The meaning of charity and charitable purpose is determined from the common law and the <i>Extension of Charitable Purpose Act 2004</i> .

<i>New law</i>	<i>Current law</i>
<b><i>Not-for-profit and for the public benefit</i></b>	
<b><i>Only charitable purposes</i></b>	
<p>An entity must have only charitable purposes and must not have an independent, non-charitable purpose. An entity may have incidental or ancillary purposes that may be non-charitable when viewed in isolation but which must aid or further the charitable purpose.</p>	<p>An entity must have only charitable purposes and must not have an independent, non-charitable purpose. An entity may have incidental or ancillary purposes that may be non-charitable when viewed in isolation but which must aid or further the charitable purpose.</p>
<b><i>Purposes for the public benefit</i></b>	
<p>The purpose of preventing and relieving sickness, disease or human suffering, the purpose of advancing education, the purpose of relieving the poverty, distress or disadvantage of individuals or families, the purpose of caring for and supporting the aged or people with disabilities, and the purpose of advancing religion are presumed as being for the public benefit, unless there is evidence to the contrary.</p>	<p>The purpose of relieving poverty, the needs of the aged and impotent, the purpose of advancing education and the purpose of advancing religion are presumed as beneficial, unless there is evidence to the contrary.</p>
<p>An entity that directs benefits to persons who are related may fail the public benefit test. However, where the purpose of an entity that has land-rights related assets would fail a public benefit test solely because the entity directs benefits to indigenous Australians who are related, the purpose is treated as being for the public benefit.</p>	<p>An entity that directs benefits to individuals who are related may fail the public benefit test.</p>
<p>The public benefit test does not apply to open and non-discriminatory self-help groups, closed or contemplative religious orders or where the purpose is directed to one or more individuals in necessitous circumstances, as described in the <i>Income Tax Assessment Act 1997</i> (ITAA 1997).</p>	<p>The <i>Extension of Charitable Purpose Act 2004</i> provides that open and non-discriminatory self-help groups and closed or contemplative religious orders are deemed to be for the public benefit.</p>

<i>New law</i>	<i>Current law</i>
<b><i>Disqualifying purpose</i></b>	
A purpose of engaging in, or promoting, activities which are unlawful or contrary to public policy is disqualifying. Public policy refers to such matters as the rule of law and system of government. It does not refer to government policies.	A purpose of engaging in, or promoting, activities which are unlawful or contrary to public policy is disqualifying.
A purpose of promoting or opposing a political party or candidate is disqualifying	A purpose of promoting or opposing a political party or candidate is disqualifying.
<b><i>Charitable purposes</i></b>	
Categories of charitable purposes are: <ul style="list-style-type: none"> <li>• advancing health;</li> <li>• advancing education;</li> <li>• advancing social or public welfare;</li> <li>• advancing religion;</li> <li>• advancing culture;</li> <li>• promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia;</li> <li>• promoting or protecting human rights;</li> <li>• advancing the security or safety of Australia or the Australian public;</li> <li>• preventing or relieving the suffering of animals;</li> <li>• advancing the natural environment;</li> <li>• any other purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, the above purposes;</li> <li>• promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country, in furtherance or protection of one or more of the above purposes.</li> </ul>	Charitable purposes established under the common law are: <ul style="list-style-type: none"> <li>• the relief of the needs of the poor, aged or impotent;</li> <li>• the advancement of education;</li> <li>• the advancement of religion;</li> <li>• other purposes beneficial to the community that are within the spirit and intendment of the Statute of Elizabeth; and</li> <li>• purposes charitable under the <i>Extension of Charitable Purposes Act 2004</i>.</li> </ul>

<i>New law</i>	<i>Current law</i>
Charitable purpose extends beyond the relief of individual distress after a disaster to include assisting with the rebuilding of a community within specified limits.	The common law limits charitable purpose to the relief of individual distress after a disaster.
<b><i>Charity-like government entities</i></b>	
Funding charity-like government entities does not prevent a contributing fund from being charitable for the purposes of Commonwealth law.	Funding charity-like government entities prevents a contributing fund from being a charity for the purposes of Commonwealth law.
<b><i>Cy pres schemes</i></b>	
A trust subject to a <i>cy pres</i> (or similar) scheme that leaves only charitable purposes may be charitable under Commonwealth law.	A trust subject to a <i>cy pres</i> (or similar) scheme that leaves only charitable purposes may not be recognised as charitable under Commonwealth law.

## Detailed explanation of new law

### Definition of charity

1.18 The preamble explains that the Parliament of Australia recognises the unique nature and diversity of charities and acknowledges the distinctive and important role they play in Australia and that a modern, comprehensive statutory definition, applying for all Commonwealth purposes and utilising familiar concepts from the common law, will provide clarity and certainty to the meaning of those concepts in contemporary Australia.

1.19 While the existing common law on the definition of charity will take have different role under a statutory definition, it will nonetheless remain relevant for the purposes of interpreting those principles, concepts and terms that have been derived from the common law and utilised in the statutory definition.

1.20 The Bill establishes the requirements for an entity to satisfy the definition of a charity. The Bill commences on 1 January 2014. A dictionary is included to assist in interpreting the terms used in the Bill. [Sections 1, 2 and 3]

1.21 An entity is a charity if it satisfies the following criteria:

- it is not-for-profit;

- it has all charitable purposes (other than ancillary or incidental purposes that further or aid the charitable purpose) that are for the public benefit;
- it does not have disqualifying purposes; and
- it is not an individual, a political party or a government entity.

*[Paragraphs 5(a) to (d)]*

***Not-for-profit***

1.22 The term ‘not-for-profit’ currently takes its ordinary meaning. However, the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 inserts a definition of ‘not-for-profit’ in subsection 995-1(1) of the ITAA 1997 which will be applied to this Bill when passed.

1.23 The Explanatory Memorandum to the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 explains its meaning in detail. *[Paragraph 5(a)]*

***Charitable purposes***

1.24 To be a charity, an entity’s purposes must all be charitable, other than incidental or ancillary purposes that further or aid the charitable purpose. *[Paragraph 5(b)]*

1.25 An entity cannot have an independent non-charitable purpose, however minor that purpose may be. A purpose is independent if it is an end in itself, or has substance in its own right, or is not intended to further or aid a charitable purpose.

1.26 However, an entity may have incidental or ancillary purposes that may be non-charitable when viewed in isolation but which must further or aid the charitable purpose. These purposes must not be ends in themselves, but tend to assist, or naturally go with, the achievement of the charitable purpose. They must be merely for the sake of, in aid of, in furtherance of, or concomitant to, the accomplishment of the entity’s charitable purpose.

1.27 In determining or substantiating an entity’s purpose, it is the substance and reality of the purpose that must be identified. To substantiate — that is, to confirm or corroborate or demonstrate — the entity’s charitable purposes, the activities of an entity may be considered. It is the role of its activities and the extent to which they further, or are in aid of, the entity’s purpose that is relevant, not the nature of the activities. In considering activities to substantiate the charitable purpose, it may be necessary to go beyond governing rules to operating rules and activities to substantiate its stated objects.

1.28 Other relevant factors may include elements of the governing documents such as powers, rules, not-for-profit and winding up clauses, clauses governing who can benefit from the entity's activities and in what ways, the entity's policies and plans, administration, finances, origins, history and control, and any legislation governing the entity's operation.

*[Note 1 in paragraph 5(b)]*

1.29 Where an entity has a non-charitable independent purpose, or its activities or other features demonstrate that it has a non-charitable independent purpose, the entity will not be a charity.

1.30 If an entity's governing rules indicate that it does not have all charitable purposes (other than incidental or ancillary purposes that further or aid the charitable purpose), the entity cannot be charitable even if some of its activities are charitable in nature or charitable consequences may result from its activities.

1.31 As explained in paragraph 1.27, an entity may engage in activities that are not intrinsically charitable provided the role of the activities is to further or aid its charitable purpose. Such activities include those that are integral to the functioning of the entity itself, such as accounting or insurance, and activities that operate to contribute to the achievement of the entity's charitable purpose, such as fundraising.

1.32 An entity is also not a charity because it uses means similar to that of a charity. For example, if an entity disseminates information, this is not sufficient to show the purpose is educational.

1.33 Similarly, an entity cannot be charitable simply because it is controlled by another entity that is charitable. It is the purpose of the entity itself that must be charitable.

1.34 The assessment as to purpose (and therefore as to whether the entity is a charity) is an ongoing one and consideration has to be given to the purpose for which it continues to be conducted, not just the purpose for which it was established.

1.35 An entity with a power to accumulate surplus funds can still be charitable as long as the surplus funds are being accumulated in order to augment the funds available to give effect to the entity's charitable purpose.

1.36 However, an entity that accumulates most of its funds over a number of years will need to show that this accumulation is still consistent with the entity having a charitable purpose. Relevant considerations include whether funds that are to be applied to its charitable purpose have been identified, and when and how they are to be applied has been considered.



*Commercial purposes*

1.37 An entity which has a purpose of carrying on a commercial enterprise to generate surpluses as an end in itself cannot be charitable.

1.38 Where an entity's governing documents allow for purposes wider than those capable of being characterised as charitable the entity cannot be charitable.

1.39 An entity undertaking commercial or business-like activities can still be charitable if its purposes are all charitable and it carries on a commercial enterprise to generate surpluses in order to further that charitable purpose rather than as an end in itself. The fact that the activities undertaken by the entity are not intrinsically charitable does not affect the characterisation of the entity as charitable.

1.40 An entity may be charitable where the purpose of the entity is charitable and the commercial activities directly carry out the charitable purpose. An example is an entity that conducts a business activity solely for the purpose of providing training and employment opportunities for people with disabilities who would otherwise find it difficult to obtain training and employment.

1.41 An entity may be charitable where the commercial operations are merely incidental to the carrying out of the charitable purpose. An example is an entity which runs a home for disadvantaged boys that also provides training through its farm.

1.42 An entity may also be charitable where the activities undertaken by the entity are themselves intrinsically charitable but are being carried on in a way that is commercial. An example is the preparation and sale of law reports. However, a commercial enterprise that is not operated in a commercially viable manner may demonstrate that the entity has another purpose, for example, a purpose of supporting its clients or subsidising the goods and services it provides to these clients.

1.43 Where a commercial entity operates for, or is owned by, a charity, it is not automatically charitable. It is the purpose of the entity itself, not of the owning charity, that must be determined. Charitable status cannot be attributed to an entity merely on the basis that it is associated with a charity. Control, ownership, the use of surplus funds, or a trust relationship, are not sufficient on their own to change a commercial entity into a charity. This does not mean that the extent of any relationship with a charity is irrelevant, but a simple 'look through' approach, which ignores the features and circumstances of the relevant entity itself, is not a relevant test for determining whether the entity is a charity.

1.44 An entity may hold passive investments to receive a market return to further its charitable purposes, or to meet reasonable operational expenses, and this will not affect its charitable status.

*Peak bodies and infrastructure entities*

1.45 Where charities establish a peak or similar body to further their common charitable purposes, the same principles and considerations apply in determining the purpose of that entity as would apply to any entity.

1.46 An entity that has a charitable purpose may advance that purpose through activities that increase the effectiveness, or enhance the long term viability, of other charities. For example, a peak body that undertakes research, policy, advocacy, educational or other supporting activities to advance the effectiveness of its member charities may be a charitable entity.

1.47 It is commonality of purpose with its members that determines whether such an entity is a charity although the purpose may be pursued in different ways and, while it must also meet the public benefit test, this may not be by dealing directly with, or to, the public.

1.48 For an entity to be a charity, even where owned or controlled by another charity, for example as an infrastructure entity that supports the entity's organisation, it must itself be a not-for-profit entity and must have only charitable purposes.

1.49 Such entities may give effect to their charitable purpose by contributing to the owner/controller entity's accomplishment of its purpose but each entity needs to be considered in terms of its own particular purposes and characteristics. As explained in paragraph 1.43, it is not possible to merely attribute the characteristics and purposes of a charitable entity to a different entity, ignoring the characteristics and purposes of the entity itself. The Commissioner of Taxation's (Commissioner) taxation ruling TR 2005/22 explains in detail the requirements concerning controlled entities. This Ruling sets out principles which continue to remain relevant in interpreting this statutory definition of charity.

***Type of entity that may be a charity***

1.50 The term 'entity' takes its meaning from the *Australian Charities and Not-for-Profits Commission Act 2012*, being:

- an individual;
- a body corporate;
- a body politic;
- any other unincorporated association or body of persons; or
- a trust.

1.51 A charity must be an entity. However, it cannot be one of the following entity types: an individual, a political party or a government entity. *[Paragraph 5(d)]*

1.52 The purposes of government in carrying out its functions and responsibilities are not charitable and a government entity cannot be a charity. However, the definition of a government entity and, in particular, its boundaries, has remained uncertain in the common law, with various factors, particularly government control, being considered as determining factors.

1.53 To give greater certainty about what is a government entity, the Bill provides that the term has the same meaning as ‘government entity’ within the meaning of the *A New Tax System (Australian Business Number) Act 1999* (ABN Act). *[Paragraph 4(1)(a)]*

1.54 As state and territory laws describe ‘government entity’ in various ways, the Bill enables the Minister to prescribe additional classes of government entities to allow the Government to list the state and territory equivalents to Commonwealth concepts already incorporated into the ABN Act definition and to allow those terms to be more easily kept up to date. The Bill gives an example of those entities likely to be prescribed, such as the state and territory equivalents of Commonwealth executive and statutory agencies. *[Paragraph 4(1) (b) and subsection 4(2)]*

1.55 The Bill includes a foreign government agency (within the meaning of the term in the ITAA 1997) within the meaning of government entity. *[Paragraph 4(1)(c)]*

### **Purposes for the public benefit**

1.56 To be a charity, an entity’s purpose or purposes must be for the public benefit. The public benefit is at the core of charity and charitable purposes. There are two aspects to the public benefit: there must be a purpose the achievement of which is of public benefit; and the benefit from the purpose must be broadly available to a sufficient section of the public. *[Subsection 6(1)]*

#### *Achievement of purpose would be of public benefit*

1.57 Each purpose of an entity must be for the public benefit. Only benefits arising from carrying out those purposes can be taken into consideration, and the recipients of benefits from the purpose must be appropriately targeted to that purpose.

1.58 The purpose of an entity and the benefit it provides must be identifiable. *[Paragraph 6(2)(a)]*

1.59 A purpose that is vague, uncertain or ambiguous, or is of indeterminable value, does not meet the public benefit test.

1.60 The benefit must not be negligible. The value or benefit must be of adequate worth, advantage, utility, importance or significance.

1.61 Benefits are not restricted to material benefits. They may be tangible, such as accommodation provided by a hostel for the homeless, or intangible, such as the social, psychological or emotional benefits derived from a visitors program for aged persons or spiritual benefits derived from religious services. *[Paragraph 6(2)(a)]*

1.62 A charitable purpose must be of benefit overall and cannot be harmful on balance. In determining public benefit, consideration must be given to any possible detriment which arises from the purpose, or would commonly arise, from carrying out of the purpose to the general public or a section of the general public. Examples of detriment or harm could include damage to mental or physical health, damage to the environment, encouraging violence or hatred towards others, or engaging in illegal activities such as vandalism or restricting personal freedom.

*[Paragraph 6(2)(b)]*

*Available to the public*

1.63 The benefit of a charitable purpose does not have to be available for the whole of the general public in order to satisfy the public element. The benefit can be available to a section of the general public as long as that section is not negligible compared to the size of that part of the general public to whom the purpose would be relevant. *[Subsection 6(4)]*

1.64 A sufficient section of the general public may be a limited number of individuals where the charitable purpose would be relevant to only a small group of people. For example, where an entity supports medical research into a very rare disease that affects only a few people in Australia, it may be for the public benefit if its purpose is directed to only those individuals suffering from the disease in Australia.

1.65 Limiting benefit recipients to groups with particular characteristics such as residents of a particular geographic area, the followers of a particular religion to which anyone can adhere, or sufferers of a particular disability or condition can be consistent with the public benefit test, provided such limitation is justified and reasonable having regard to the nature of the purpose and the benefit.

1.66 Charging fees to members of the public for goods, services, or other benefits where the purpose is otherwise charitable is not inconsistent with a charitable purpose. While there must be a public benefit from the purpose, the benefit may be made available in various ways and fees will merely be another factor to be considered in applying the public benefit test.

*Private benefit*

1.67 An essential element of a charity is that it does not confer benefit on anyone other than intended benefit recipients of the charitable purpose as members of the public, except incidentally (see paragraph 1.70).

1.68 In determining public benefit, regard must be had to any benefits to entities (including individuals) directly or indirectly associated with the entity, other than where these benefits are to other charities, for example, members of peak bodies. The greater the scope to provide private benefits, the greater the potential that the purpose is not to benefit the general public but to provide private benefits. *[Paragraph 6(3)(a)]*

1.69 Benefits or payments to officers, suppliers, and associates must not exceed what is reasonable and appropriate. Pecuniary benefits received by individuals are also relevant in considering the not-for-profit definitional element of the statutory definition.

1.70 Where there are private benefits, these must be incidental or ancillary, that is, a necessary minor result or by-product, or conferred as a necessary means, of carrying out the entity's charitable purpose, and be genuine and reasonable.

1.71 An entity that exists to advance the interests of members in their capacity as members cannot be charitable as it would not satisfy the public benefit test. The members of such entities do not, as members, constitute a section of the public in the relevant sense (because of size or the relationship between the benefit recipients), and the benefits derived by the members are, as a result, private in nature. However, an entity that benefits its members can still be charitable if the member benefits are merely incidental, ancillary and concomitant to the purpose of benefiting the public.

1.72 A purpose of providing benefits to members does not become charitable simply because the motivation of the entity has some social value or, as a consequence of its activities, some indirect value to the general public arises. For this reason, professional or occupational associations are unlikely to be charitable.

1.73 Similarly, community and economic development, and the advancement of industry, commerce or agriculture can be charitable purposes in certain circumstances but particular consideration must be given as to whether carrying out such purposes allows an entity to provide benefits to individual entities or members that cannot be considered incidental to the public benefit. If benefiting or advancing the interests of individual entities or advancing the commercial interests of a particular industry can be construed as a purpose, the entity cannot be charitable.

1.74 Placing limits on those who can benefit is generally incompatible with an intention of benefiting the general public if the

limits are by reference to some personal connection such as being members of a family or a group, which is based on personal or employment relationships to particular individuals, or on membership of bodies that can admit or exclude members of the public. Benefits in these cases are usually intended for people in their capacity as relatives, employees or members rather than as a section of the public and therefore do not meet the public benefit test. (See paragraphs 1.89 to 1.94 about benefits directed to indigenous persons who are related.) *[Paragraph 6(3)(b)]*

1.75 A public benefit does not generally exist where there is a relationship between the donor entity and the possible benefit recipients such as a family or employment relationship.

*'Poor relations' and 'poor employees'*

1.76 As the public benefit test has been applied less strictly to a purpose for the relief of poverty, gifts or trusts have been established in the past to provide benefits to a limited range of people that are closely connected, for example, because of family ties (poor relations) or a shared employer (poor employees) or members of an association (poor members). These trusts, some of which seek to operate indefinitely, are widely considered anomalous in contemporary Australia and such a purpose is no longer likely to satisfy a public benefit requirement.

1.77 However, entities that have a purpose of relieving poverty and were registered with the ACNC before the commencement of the Bill will continue to be treated as being for the public benefit following the commencement of this Bill. *[Schedule 2, item 6 of the Charities (Consequential Amendments and Transitional Provisions) Bill 2013]*

1.78 The Commissioner's taxation ruling TR 2011/4 explains in further detail the elements and requirements of the public benefit test. This Ruling sets out the principles which continue to remain relevant in interpreting this statutory definition of charity.<sup>1</sup>

***Certain purposes presumed to be for public benefit***

1.79 Under the common law, a purpose that is for the relief of the needs of the poor, the aged and the impotent, advancing education or advancing religion is presumed to be a purpose that benefits the public, unless there is evidence to the contrary. Entities with other charitable purposes must positively establish that their charitable purposes are beneficial. *[Section 7]*

1.80 The Bill retains the presumption of benefit for the purposes of advancing education, advancing religion and the relief of poverty, distress

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<sup>1</sup> See paragraphs 15 to 19 and 129 to 149 for detail on the public benefit test.

or disadvantage. Distress or disadvantage relate to lack of financial resources. *[Paragraph 7(b)(c) and (e)]*

1.81 The purposes presumed to be beneficial also include caring for and supporting the aged and individuals with disabilities. *[Paragraph 7(d)]*

1.82 The term ‘impotent’ in the common law covers a range of circumstances involving vulnerability, such as sickness, the inability of children to care for themselves, or a need for refuge accommodation. The parameters of a modern equivalent are not readily identifiable. The Bill applies the presumption of benefit to a purpose of preventing and relieving sickness, disease or human suffering attributable to a health-related cause as part of a modern proxy for the purpose of relieving the needs of the impotent.

1.83 The purposes of preventing and relieving sickness is encompassed by the higher level category of purposes described in the Bill as advancing health. The purposes of relieving poverty, distress or disadvantage or caring for and supporting the aged or individuals with disabilities are encompassed by the purpose of advancing social or public welfare. These categories were identified in the Charities Definition Inquiry report. *[Section 7 and Note 1, section 14 and subsections 15(1) and (2)]*

1.84 The Bill extends the presumption to the whole of the public benefit test, rather than merely a presumption that the purpose is beneficial. This reflects the more common approach to how the test is being applied in practice by charities.

1.85 Similar to the position under the common law, the presumption of public benefit is rebutted or overturned where there is evidence available to suggest that an entity does not in fact meet the public benefit test or an element of the test. If the Commissioner of the ACNC has reason to believe there is evidence to the contrary, the Commissioner may decline to register an entity or may notify a registered entity to the effect that the presumption does not apply and that entity must then provide evidence demonstrating that its purpose is for a public benefit. *[Section 7]*

#### ***Relief of necessitous circumstances***

1.86 The public benefit test has been applied less strictly to a purpose for the relief of poverty. As outlined in paragraph 1.76, the Bill does not exclude the purpose of the relief of poverty from the need to be for the public benefit. However, a purpose for the relief of poverty, for example, in disadvantaged communities or among a particular description of poor people, provided it is not unduly restrictive, is unlikely to fail a public benefit test.

1.87 The Bill nonetheless ensures that entities established for the relief of one or more individuals in ‘necessitous circumstances’, which may otherwise not meet a public benefit test, may continue to be charitable entities. *[Section 8]*

1.88 ‘Necessity’ refers to financial necessity or needs which are not financial but can cause financial need, such as health needs. Generally these funds are set up to benefit particular individuals such as disabled individuals or individuals affected by disaster. The Bill provides that such a purpose does not need to be for the public or a sufficient section of the public. *[Section 8]*

***Purposes of entities that receive, hold or manage benefits that relate to native title etc.***

1.89 As explained in paragraph 1.74, an entity that places limits on who can benefit from its charitable purpose where the limits are by reference to a special or personal relationship or connection may fail a public benefit test.

1.90 Some entities that provide benefits to indigenous Australians may fail a public benefit test solely because benefits are limited to persons who have family or other traditional relationships.

1.91 These limits may arise because the entity holds, receives or manages amounts or non-cash benefits (within the meaning of the ITAA 1997) including assets that relate to native title or traditional indigenous rights of ownership, occupation, use or enjoyment of land. As traditional land ownership or usage involves persons who are related or who are otherwise connected in a way traditionally recognised by indigenous persons, the effect may be that these entities direct benefits only to such persons.

1.92 The Bill ensures that such entities do not fail a public benefit test solely because the beneficiaries are related. *[Section 9]*

1.93 However, other aspects of the public benefit test, including the nature and purposes of the entity, the beneficiary class, other relationships between the beneficiaries and the number of beneficiaries, are still relevant when determining whether the entity is charitable.

1.94 Where entities with a charitable purpose provide benefits to indigenous Australians, and the recipients happen to be related, (because, for example, the purpose is directed to a benefit within a particular geographic region), provided the relationship is merely incidental to the characteristic the benefit that is being addressed, and the benefits are not directed in an unduly restrictive way, the purpose is not likely to fail a public benefit test.

***When the public benefit test does not apply***

1.95 The public benefit test does not apply in the case of open and non-discriminatory self-help groups and closed or contemplative religious orders that regularly undertake prayerful intervention at the request of members of the public. These entities were relieved from the public benefit test in the *Extension of Charitable Purpose Act 2004*. *[Section 10]*



1.96 Open and non-discriminatory self-help groups are often organised and managed by the same people that benefit from the group. For this reason, such groups would not typically be able to satisfy the public benefit test.

1.97 To satisfy the statutory definition of ‘open and non-discriminatory self-help group’, the entity must be established for the purpose of assisting individuals. The individuals must be affected by a particular disadvantage or discrimination, or a need arising out of a particular disadvantage or discrimination that is not being met. While self-help groups are particularly common in the area of health for particular diseases or disabilities, or for particular treatments, the definition is not limited to these purposes. However, the disadvantage or discrimination identified must be of a kind that is consistent with the meaning of charitable purpose.

1.98 The assistance provided by the self-help group must be of a kind that is connected with the particular disadvantage, discrimination or unmet consequential need.

1.99 The requirement of open membership refers to both the entity’s rules and also to its reality and substance. It is not sufficient for an entity to have rules that are consistent with open and non-discriminatory membership. It must also in reality operate in a manner that is consistent with having open and non-discriminatory membership.

1.100 There has been some doubt under the common law about whether a closed or contemplative religious order fulfils the public benefit test and the Bill ensures such an entity does not fail a public benefit test.

1.101 Although open and non-discriminatory self-help groups and closed or contemplative religious orders will not be required to meet the public benefit test, it will still be necessary for the entity to satisfy the other requirements to be a charity, including having only charitable purposes.

### **Disqualifying purpose**

1.102 The purpose of engaging in, or promoting, activities which are unlawful or contrary to the public policy is not a charitable purpose under the common law and is a disqualifying purpose in the Bill.

1.103 The Bill clarifies that the reference to public policy refers to matters such the rule of law, the system of government of the Commonwealth, the safety of the general public and national security and that activities are not contrary to public policy merely because they are contrary to government policy. *[Paragraph 11(a) and Note]*

1.104 Political parties are not charitable and a purpose of promoting or opposing a political party or a candidate for political office is not a charitable purpose. *[Paragraph 11(b)]*

1.105 However, a means that entities commonly use to achieve their charitable purposes is generating, and engaging in, debate about government laws and policy. The Bill notes that a purpose of promoting or opposing a change to any matters established by law, policy or practice in the Commonwealth, a State or Territory or another country may be a charitable purpose in certain circumstances. *[Paragraph 11(b) and paragraph 12(1)(l)]*

1.106 The independent nature of the charitable sector is greatly valued by the public.

1.107 The disqualifying purpose is concerned with direct partisan political engagement that supports or opposes a candidate or party for office or other partisan political engagement to the extent and in a way that this can be construed as a purpose.

1.108 This does not prevent entities from distributing information, critiquing or comparing party policies in order to further the achievement of their charitable purpose. *[Paragraph 11(b)]*

1.109 Entities may engage with candidates or representatives of political parties to lobby, debate or seek explanation of policies relevant to their charitable purposes. They may also assess and critique their policies.

1.110 In determining whether an entity has a purpose to promote or oppose a candidate or political party, considerations could include whether the focus of the entity is on promoting or opposing a particular candidate or a political party in general, rather than on their policies that are relevant to the charitable purpose, the direct nature and extent of engagement and association with a candidate's or a party's campaigns or publications, or lack of balance in promoting or opposing the policies of another political party or candidate with similar policies relevant to the charitable purpose.

1.111 Directly funding a political party is not permitted under the *Commonwealth Electoral Act 1918*. In addition, the electoral law has rules about activities that could be seen as election-related campaigning by organisations, including charities, and party political activities could put charities in conflict with, or allow them to circumvent, the strict regulation of political parties, elections, and funding and disclosure requirements and limitations in that law. The requirements of the electoral laws are relevant in considering whether an entity has a disqualifying purpose.

### **Definition of charitable purpose**

1.112 The Bill describes categories of charitable purposes that have significant recognition in the common law, broadly following the categories identified in the Charities Definition Inquiry report.

1.113 The charitable purposes listed in the Bill are not limited in their jurisdiction, other than where the purpose is specific to Australia. However, there may be requirements in other legislation that affects whether and how entities may carry out a charitable purpose overseas.  
*[Subsection 12(3)]*

1.114 Where an entity has a charitable purpose before the commencement of the Bill and the purpose does not come within the categories described in the Bill, that purpose is treated as being a purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in the Bill. *[Paragraph 12(1)(k) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013, Schedule 2, item 7]*

1.115 The charitable purposes listed in the Bill have been derived from principles from the common law. While those principles may be expressed using a different form of words in order to use a clearer or simpler style of expression, this is not to be taken to mean that a different idea is intended to be expressed by those different words.

1.116 The common law remains relevant in interpreting the charitable purposes, including their meaning and scope.

1.117 Generally, where the scope of a charitable purpose is intended to be altered it has been included in Division 2 of Part 2 of the Bill.

### ***Advancing health***

1.118 Advancing health includes, without limitation, the prevention and relief of sickness, disease or human suffering through, for example:

- care, treatment and rehabilitation by hospitals, alcohol and drug treatment centres, mental health institutions and community health services such as home nursing, alcohol and drug rehabilitation and patient transport services;
- the provision of public health services aimed at advancing the health of the general public or sections of the general public, such as health promotion, nutrition services, immunisation and screening for diseases; and
- research related to the nature, prevention, diagnosis, treatment and incidence of disease and other health problems, research into health services, nutritional problems, pharmacology and similar services.

*[Paragraph 12(1)(a)]*

### ***Advancing education***

1.119 Advancing education includes, without limitation:

- providing formal education through preschools, schools and tertiary education institutions, including building and related educational facilities;
- vocational training;
- research directed towards expanding human knowledge and made publicly available;
- less formal education aimed at the development of citizenship and core life skills;
- the support of education, such as through the provision of prizes and scholarships,
- the provision and support of facilities and services integrally associated with the operation of education institutions, such as parents and citizens associations organisations.

***[Paragraph 12(1)(b)]***

1.120 Advancing education can occur irrespective of the age of the beneficiaries.

1.121 Advancing education does not include education in the sense that all experience is educative. Less formal education is limited to the development of citizenship and core life skills.

1.122 Where the purpose of an entity is to promote a particular view, the purpose may not be charitable on the basis that it is not genuinely educational. Education does not have to be value free but the information presented should be based on evidence and reasonable analysis.

1.123 A purpose is not charitable where it lacks any educational merit or is of little or no value to the public.

***Advancing social or public welfare***

1.124 Advancing social and community welfare, without limitation, includes:

- relieving poverty, distress or disadvantage of individuals or families;
- caring for and supporting the aged, including the provision of residential and non-residential care;
- caring for and supporting people with a disability, including the provision of residential and non-residential care;
- assisting and supporting Australia's disadvantaged Indigenous people, including advancing economic opportunities in disadvantaged communities; and reducing the disadvantage experienced by Indigenous peoples and enhancing their general wellbeing;

- alleviating disadvantage experienced by people with special needs, such as refugees;
- assisting and supporting people who are disadvantaged in the labour market;
- providing housing and accommodation support for people with special needs or who are otherwise in a special disadvantage in terms of their access to housing;
- relieving distress caused by natural disasters and sudden catastrophes;
- addressing disadvantage through international development, for example, through overseas aid.

**[Paragraph 12(1)(c)]**

1.125 The persons to benefit under the purpose of relieving poverty need not be destitute or on the border of destitution. In Australia, those lacking the resources to obtain what is necessary for a modest standard of living in the Australian community may be accepted as suffering poverty. To relieve poverty implies that the people in question have a need attributable to their condition which requires alleviating, and which those people could not alleviate or would have difficulty in alleviating by themselves. The ways in which poverty can be relieved include providing money, accommodation, legal or medical aid.

1.126 Advancing social or community welfare includes the purpose of caring for, supporting and protecting children and young people and, in particular, providing child-care services. This charitable purpose was included in the *Extension of Charitable Purpose Act 2004* as it was not clearly charitable under the common law. **[Subsection 15(3)]**

1.127 Advancing social and community welfare includes the purpose of assisting rebuilding, repairing or securing assets after a disaster, in furtherance of the purposes of exempt entities within the meaning of the ITAA 1997. **[Subsection 15(4)]**

1.128 The effect of the provision is to extend charitable purposes to include re-establishing not-for-profit community assets after a disaster, independently of the relief of individual distress. Any benefits of a commercial or private nature must be only incidental or ancillary to re-establishing the community assets and the assets must not be government assets.

1.129 Rebuilding may be in a different location and to a higher standard where necessary to mitigate future risk.

1.130 The Bill describes a disaster in the terms used in the ITAA 1997 relating to the declaration of a disaster for the purposes of Australian Disaster Relief Funds. **[Paragraph 15(4)(a)]**

***Advancing religion***

1.131 Advancing religion involves the promotion of spiritual teaching and the observances that serve to promote and manifest it. The purpose must be directly and immediately religious and involve various ways of advancing religion, including providing and maintaining facilities for worship; supporting religious clergy; missionary bodies; and religious associations.

1.132 It is not enough that a purpose arises out of or has a connection with a faith, a church or a denomination. If the purpose is not directly or immediately religious it is not charitable. For example, social, recreational or sporting purposes are not charitable even if membership is limited to followers of a particular religion.

1.133 It is also not enough that an entity does something merely in the name of religion for it to be a charity advancing religion. A purpose expressed as advancing religion cannot be used as a means of promoting or expressing aims or opinions that are not charitable and would not be for charitable purposes if expressed by a non-religious organisation.

*[Paragraph 12(1)(d)]*

***Advancing culture***

1.134 Advancing culture increases the public appreciation of arts, music or literature, national identity and heritage and, without limitation, includes:

- promoting and fostering culture;
- caring for, preserving and protecting the Australian heritage;
- promoting participation in the arts, including literature, music, the performing arts and visual arts;
- establishing and maintaining public museums (including botanical or zoological gardens), libraries and art galleries, and moveable cultural heritage;
- promoting Australian Indigenous culture and customs;
- promoting culture and customs of language and ethnic groups (other than where the purpose is social in nature); and
- protecting and preserving national monuments, areas of national interest and national heritage sites and buildings.

*[Paragraph 12(1)(e) and section 16]*

***Promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia***

1.135 Promoting reconciliation, mutual respect and tolerance between individuals in Australia which, without limitation, includes:

- promoting harmony and understanding and the lessening of conflict between people from different races, religions or belief systems;
- eliminating discrimination, for example on grounds of age, gender or sexual orientation, and promoting equality and diversity;
- promoting restorative justice and other forms of conflict resolution or reconciliation; and
- mediating, conciliating or reconciling persons, organisations, authorities or groups involved, or likely to become involved, in dispute or conflict.

*[Paragraph 12(1)(f)]*

***Promoting or protecting human rights***

1.136 The purpose of promoting or protecting human rights refers to the rights and freedoms recognised or declared by the international instruments specified in the *Human Rights (Parliamentary Scrutiny) Act 2011* as they apply to Australia.

1.137 The international instruments cover the elimination of racial discrimination and discrimination against women; economic, social and cultural rights; civil and political rights; conventions against torture and cruel, inhuman or degrading treatment or punishment; rights of the child; and rights of individuals with disabilities.

1.138 Promoting or protecting human rights includes, without limitation:

- promoting human rights, at home or abroad;
- relieving victims of human rights abuse; and
- raising awareness of human rights issues.

*[Paragraph 12(1)(g)]*

***Advancing the security and safety of Australia and the Australian public***

1.139 The purpose of advancing the safety and security of the general public, without limitation, includes:

- providing safe houses;
- promoting Neighbourhood Watch, establishing and operating ‘crimestoppers’ or similar schemes, and liaising with the police on addressing the causes of crime in an area;
- establishing, operating and supporting volunteer fire brigades, volunteer emergency services organisations and other safety services such as surf lifesaving;

- providing a conciliation service;
- providing advice and support to victims and offenders: and
- promoting the efficiency of the Australian Defence Forces including by providing aid, comfort and encouragement to serving and former defence personnel and their families  
*[Section 17].*

*[Paragraph 12(1)(h)]*

***Preventing or relieving the suffering of animals***

1.140 The purpose of preventing or relieving the suffering of animals, without limitation, includes:

- promoting benevolence and preventing or suppressing cruelty to animals;
- providing animal sanctuaries;
- providing veterinary care and treatment; and
- caring for, and re-homing, animals that are abandoned mistreated or lost.

*[Paragraph 12(1)(i)]*

***Advancing the natural environment***

1.141 Advancing the natural environment, without limitation, includes:

- preserving native flora and fauna;
- rescuing and caring for native animals;
- preserving or rehabilitating habitats;
- promoting sustainable development and biodiversity; and
- protecting, preserving, caring for, and educating the community about, the environment.

*[Paragraph 12(1)(j)]*

1.142 It is not enough for an entity to carry out activities in the name of advancing the natural environment. The benefit must be identifiable and of sufficient value and cannot be incidental to a non-charitable purpose. For example, an entity that provides recreational experience in a natural environment is unlikely to have a charitable purpose of advancing the environment where the educational benefit is relatively minor or incidental to the recreational experience.



***Any other purposes beneficial to the public that may reasonably be regarded as analogous to, or within the spirit of, any of the preceding purposes***

1.143 This provision encompasses other purposes which the courts have found to be charitable, which do not come within the categories described in the Bill and which were charitable purposes before the commencement of the Bill. [*Paragraph 12(1)(k), Charities (Consequential Amendments and Transitional Provisions) Bill 2013, Schedule 2, item 7*]

1.144 The provision also allows for the meaning of charitable purpose to develop through future court decisions interpreting the definition within the new statutory framework, in accordance with contemporary Australian society's needs and expectations.

1.145 The meaning of charity (at Commonwealth level) is not affected by state or territory law. Where state or territory legislation extends charitable status to new purposes, those purposes are not accepted as charitable for Commonwealth purposes. For example, while some States have enacted legislation that extends charitable status to the provision of recreational facilities, recreational purposes are not charitable for Commonwealth purposes.

1.146 A purpose that is essentially social, recreational or sporting is not charitable regardless of motivation or the benefits to the general public that can result.

1.147 While social, sporting and recreational purposes are not charitable purposes, social, recreational or sporting activities that are incidental to a charitable purpose and further or aid that purpose, such as health or education, do not necessarily prevent that purpose from being charitable.

***Promoting or opposing a change to matters established by law, policy or practice in relation to another charitable purpose***

1.148 A purpose of generating public debate with a view to influencing legislation, government activities or government policy in furtherance or protection of one or more existing charitable purposes, in a manner consistent with those purposes, may be charitable.

1.149 However, such a purpose will only be charitable where the means used and the ends to be achieved are not inconsistent with the rule of law and the established system of government, for example, the use of bribery to achieve an end or promotion of anarchy would not be a valid charitable purpose. [*Paragraph 12(1)(l)*]

1.150 A purpose of generating public debate that is not in furtherance of or protection of another valid charitable purpose is not itself a charitable purpose. A purpose of generating public debate must be sufficiently connected with, operating in a manner consistent with, and

attempting to further or protect another recognised charitable purpose for the purpose to be a charitable purpose. *[Subsection 12(2)]*

### **Funds that contribute to charity-like government entities**

1.151 Charitable funds, such as private and public ancillary funds, lose their charitable status under Commonwealth law if they distribute to an entity that is not a charity. However, some government entities, such as certain public health services, would be a charity except for the fact that they are a government entity. Further, under some state laws, charitable funds are able to donate to charity-like government entities and maintain their charitable status.

1.152 The Bill makes similar provision to allow charitable funds, to retain their charitable status for the purposes of Commonwealth law where they provide benefits to an entity that would be a charity except that it is a government entity. *[Section 13]*

### **Miscellaneous**

#### *Cy pres and similar schemes*

1.153 When determining the purpose of the trust, a *cy pres* scheme allows for the purposes of a trust to be altered to remove purposes that are not charitable purposes. The Bill provides that *cy pres* schemes are to be recognised when determining whether an entity is a charity.  
*[Paragraph 18(a)]*

1.154 In determining whether an entity that is subject to a *cy pres* scheme is a charity for Commonwealth law purposes, the most recent court order concerning the scope of its charitable purpose should be taken into account.

1.155 States and Territories also regulate the operation of trusts in their jurisdiction through trust legislation. These jurisdictions have legislation which may give effect to a scheme, similar in substance to the *cy pres* scheme under the general law, which may sever any non-charitable purposes from a mixed purpose trust to leave a valid charitable trust in respect of charitable purposes only.

1.156 State and Territory laws which provide for these ‘*cy pres*-like’ schemes include:

<i>Jurisdiction</i>	<i>Relevant provisions</i>
New South Wales	Section 23 of the <i>Charitable Trusts Act 1993</i> (NSW)
Victoria	Section 7M of the <i>Charities Act 1978</i> (Vic)
Queensland	Section 104 of the <i>Trusts Act 1973</i> (Qld)
Western Australia	Section 102 of the <i>Trustees Act 1962</i> (WA)
South Australia	Section 69A of the <i>Trustee Act 1936</i> (SA)

1.157 The Bill provides that if a mixed purpose trust is subject to a *cy pres*-like scheme under State or Territory law, the scheme is to be considered in determining whether the entity may be charitable for Commonwealth law purposes. *[Paragraph 18(b)]*



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## ***Transitional and consequential amendments***

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2.1 This Chapter explains the amendments to Commonwealth legislation by the Charities (Consequential Amendments and Transitional Provisions) Bill 2013 as a consequence of the introduction of a statutory definition of charity in the Charities Bill 2013.

2.2 This Chapter covers:

- how the terms charity and charitable purpose have application to Commonwealth legislation;
- the grandfathering of existing charitable purposes, so these purposes remain charitable after the commencement of this legislation;
- the repealing of existing legislation addressing some aspects of charitable purpose that has been included in the Charities Bill 2013;
- changes required to give effect to the expanded number of categories of charitable purpose, including transitional arrangements for streamlining registration of the new subtypes of entities with the Australian Charities and Not-for-profits Commission (ACNC); and
- consequential changes as a result of the amendments in the Charities Bill 2013 to enable charities to provide funds to entities that are connected to government without losing charitable status.

2.3 References in this Chapter to the ‘Consequential Amendments Bill’ are references to the Charities (Consequential Amendments and Transitional Provisions) Bill 2013.

### **Context of amendments**

2.4 The Charities Bill 2013 defines charity and charitable purpose for the purposes of Commonwealth laws. Consequential amendments are needed to Commonwealth legislation that refers to these concepts in different terms.

### **Summary of new law**

2.5 As a result of the introduction of a definition of charity and charitable purpose in the Charities Bill 2013, a number of consequential

amendments to Commonwealth legislation and transitional arrangements are required.

2.6 The key features of the Consequential Amendments Bill are to:

- include the terms charity and charitable purpose in the *Acts Interpretation Act 1901* to ensure that they have a consistent meaning for all Commonwealth law purposes;
- repeal the *Extension of Charitable Purpose Act 2004*, recognising that the Charities Bill 2013 provides that charitable purpose includes child care and open and non-discriminatory self-help groups and closed or contemplative religious orders;
- amend the *Australian Charities and Not-for-profits Commission Act 2012* (ACNC Act) to reflect the new characterisation of charitable purpose that has been included in the Charities Bill 2013 resulting in changes to applications for registration and sub-types of charities that are registered;
- repeal the income tax exemption available to non-charitable public and private ancillary funds that provide money, property and benefits to deductible gift recipients that are income tax exempt. This recognises that the Charities Bill 2013 extends charitable purposes to funds that provide money, property and benefits to entities that would be charitable if they were not government entities; and
- amend legislation to ensure that the terms ‘charity’ and ‘charitable purpose’ are used consistently across Commonwealth laws.

## Detailed explanation of new law

### *Definition of charity and charitable purpose*

2.7 The Consequential Amendments Bill ensures that the definition of charity and charitable purpose applies consistently across Commonwealth legislation. This is achieved by amending the *Acts Interpretation Act 1901* and other legislation to provide that references in Commonwealth Acts to charitable, charity or charitable purpose take their meaning from the Charities Bill 2013 unless the contrary intention is specifically provided for in Commonwealth legislation. *[Schedule 1, items 1, 2 to 4, 14, 38 and 39 of the Consequential Amendments Bill]*

2.8 The *Criminal Code Act 1995* is an example of where the legislation has a contrary intention, so this legislation is amended to make it clear that the definitions of charitable purpose in the Charities Bill 2013 do not apply to that legislation. *[Schedule 1, items 10 to 13 of the Consequential Amendments Bill]*

***Previous legislation — charitable purposes***

2.9 The Consequential Amendments Bill repeals the *Extension of Charitable Purpose Act 2004*. This Act provided a statutory extension to the common law meaning of ‘charity’ for the purposes of all Commonwealth legislation. [*Schedule 1, item 43 of the Consequential Amendments Bill*]

2.10 The *Extension of Charitable Purpose Act 2004* ensured that:

- organisations providing child care to the public on a not-for-profit basis;
- self-help bodies with open and non-discriminatory membership; and
- closed or contemplative religious orders that offer prayerful intervention at the request of the public,

were treated as charities for the purposes of Commonwealth legislation.

2.11 The repeal of the *Extension of Charitable Purpose Act 2004* allows the Charities Bill 2013 to deal comprehensively with the meaning of charity and charitable purpose. Accordingly, the Charities Bill 2013 ensures that public not-for-profit child care, open and non-discriminatory self-bodies help bodies and closed or contemplative religious orders offering prayerful intervention at the request of the public continue to be charitable.

2.12 The national rental affordability scheme has not been included as a charitable purpose in the Charities Bill 2013. This reflects that, following the decision of the High Court of Australia in *Federal Commissioner of Taxation v Word Investments Ltd* (2008) 236 CLR 204, entities can be charitable despite undertaking commercial activities provided the activities are in aid of, or further their charitable purpose.

***Grandfathering of charitable purposes***

2.13 Where an entity has a purpose which, on the day before the commencement day, was a charitable purpose, and to which paragraphs 12(1)(a) to (j) and (l) of the Charities Bill 2013 do not apply, that purpose is treated as being a purpose beneficial to the general public that may reasonably be regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j) of that definition. [*Schedule 2, item 7 of the Consequential Amendments Bill*]

2.14 This provision has the effect of grandfathering existing charitable purposes so that they remain charitable purposes after the commencement of the Charities Bill 2013.

**Registration of charity subtypes***Expanded categories of subtypes of entity*

2.15 The Charities Bill 2013 expands the number of categories of charitable purpose from four to 12. Public benevolent institutions and health promotion institutions also continue to qualify for a separate subtype of entity registration.

2.16 As a result of the expanded number of categories of charitable purposes, amendments are made to the ACNC Act to reflect that there are 14 subtypes of charity, rather than the existing six categories. *[Schedule 1, item 7 of the Consequential Amendments Bill]*

2.17 Transitional provisions are also included in the Consequential Amendments Bill to address the need to revise existing subtypes of charity registration and to deal with applications for registration from the commencement of the legislation to the new subtypes of charity registration with the ACNC.

2.18 The transitional arrangements apply to entities that on the day before the legislation commences:

- are registered with the ACNC as one or more of the existing six subtypes of charity; or
- have outstanding applications for registration with the ACNC as one or more of the existing six subtypes of charity.

*Registration — old subtypes equivalent to new subtypes*

2.19 There are five existing subtypes of charity that are treated as having a corresponding new subtype of charity from the commencement of the legislation. These are:

**Table 2.1: Transitional arrangements for corresponding subtype of entity registration**

<i>Existing subtype of entity on 31 December 2013</i>	<i>New subtype of entity from 1 January 2014</i>
Advancing education	Advancing education
Advancing religion	Advancing religion
Health promotion institution	Health promotion institution
Public benevolent institution	Public benevolent institution
Provision of child care services	Advancing social or public welfare

*[Schedule 2, subitem 2(3) of the Consequential Amendments Bill]*

2.20 The transitional amendments ensure that on the day before the commencement of the legislation, entities with one or more of the above five existing subtypes of charity registration, and applications for such



registration, are automatically transitioned into the new category of subtype. *[Schedule 2, subitems 2(1) and (2) of the Consequential Amendments Bill]*

*Registration — old subtypes possibly equivalent to new subtypes*

2.21 In contrast, entities that are registered or have an application for registration pending on the day before the commencement of the legislation for a subtype of charity for the relief of poverty, sickness or the needs of the aged, or other purposes beneficial to the community may qualify under a number of different new categories of charitable purpose.

2.22 Accordingly the transitional provisions provide for registration and applications for registration for the relief of poverty, sickness or the needs of the aged, or other purposes beneficial to the community to correspond to the following new subtype of entity registration on the commencement day:

**Table 2.2: Transitional arrangements for potentially corresponding subtypes of entity registration**

<i>Existing subtype of entity from 31 December 2013</i>	<i>New subtype of entity from 1 January 2014</i>
Relief of poverty, sickness or the needs of the aged	Advancing health Advancing social or public welfare
Other purposes beneficial to the community	Advancing social or public welfare Advancing culture Promoting reconciliation, mutual respect and tolerance between groups of individuals that are in Australia Promoting or protecting human rights Advancing the security or safety of Australia or the Australian public Preventing or relieving the suffering of animals Advancing the natural environment Purposes beneficial to the general public Promoting or opposing a change to law, policy or practice in Australia or overseas

*[Schedule 2, item 3 of the Consequential Amendments Bill]*

- 2.23 Entities that on the day before the legislation commences:
- are registered or have applied for subtype registration that has not yet been determined by the ACNC; or
  - are registered or have applied for registration as the existing subtypes of the relief of poverty, sickness or the needs of the aged and, other purposes beneficial to the community;

may advise the ACNC which new category of subtype of charity that they should be registered under. *[Schedule 2, subitems 3(1) and (2)]*

2.24 Entities have 18 months from the commencement of the legislation to make a request in the approved form to the Commissioner of the ACNC under the transitional provision. *[Schedule 2, subitem 3(4) of the Consequential Amendments Bill]*

2.25 In addition, an entity can revise an application for registration or seek registration under a different subtype of charity at any time. The purpose of the transitional provisions is to streamline the transition of existing subtype registrations and outstanding applications for subtype registrations on the day before commencement of the legislation.

2.26 The Consequential Amendments Bill contains a dictionary of terms to ensure that terms used in the transitional provisions in the Bill are consistent with the ACNC Act. These include:

- adopting the abbreviation of ACNC Act;
- adopting the meaning of approved form from the ACNC Act;
- clarifying the meaning of commencement as the day that the transitional provisions commence; and
- inserting a definition of endorsed as a contributing fund.

*[Schedule 2, item 1 of the Consequential Amendments Bill]*

***Income tax exemption: private and public ancillary funds***

2.27 Previously, a specific income tax exemption was provided to public and private ancillary funds to allow them to contribute to deductible gift recipients whether or not they were charitable, for example, entities that would be charities if they were not government entities.

2.28 This specific income tax exemption was introduced to address a court decision, *Central Bayside*, which clarified that a charity could not give to charity-like government entities without affecting its status as a charity.

2.29 The Charities Bill 2013 extends charitable status to ancillary funds where they contribute to an entity that would be charitable if it were not a government entity. This enables such entities to retain their charitable status and therefore removes the need for a specific income tax exemption to be available to overcome the Court decision.

2.30 This treatment is similar to section 7K of the *Charities Act 1978* (Vic) which provides ‘(1) The powers of the trustees of a charitable trust include a power to provide money, property or benefits to or for an eligible entity, or for the establishment of an eligible entity, that, but for a connection to government, would be a charity to or for which, or

for the establishment of which, money, property or benefits could be provided in accordance with the trust instrument’.

2.31 In harmonising the treatment of these funds, new funds established after the commencement of this legislation in States with more flexible rules than the Victorian model may need to change the entities to which they contribute to avoid losing income tax exemption.

2.32 The income tax exemption in item 4.1 in section 50-20 of the *Income Tax Assessment Act 1997* (ITAA 1997) that applies to non-charitable public and private ancillary funds which provide money, property and benefits to income tax exempt deductible gift recipients is repealed. Existing funds falling under item 4.1 will benefit from the grandfathering provision discussed at paragraph 2.34 below.

2.33 A number of consequential changes are required to the *Income Tax Assessment Act 1936* and the ITAA 1997 to reflect this change. *[Schedule 1, items 19 to 23, and items 26 to 35 of the Consequential Amendments Bill]*

***Transitional arrangements for endorsement of funds that contribute to charity-like government entities***

2.34 The Bill ensures that existing item 4.1 type income tax exempt funds that are endorsed by the Commissioner of Taxation are treated as registered charities following these amendments. *[Schedule 2, item 4 of the Consequential Amendments Bill]*

2.35 These income tax exempt funds are provided with an opt out provision, should they not wish to be endorsed as a registered charity. *[Schedule 2, item 5 of the Consequential Amendments Bill]*

***Grandfathering of ‘poor relations’ and ‘poor employees’ trusts***

2.36 As discussed at paragraph 1.76 above, gifts or trusts that provide benefits to a limited range of people that are closely connected, whether because of family ties (poor relations) or a shared employer (poor employees) may have been charitable under the common law.

2.37 These trusts, which may continue indefinitely, are widely considered anomalous in contemporary Australia. Such a purpose is no longer likely to satisfy a public benefit requirement. However, to reflect that these trusts may be difficult to change, the Consequential Amendments Bill will ‘grandfather’ these existing trusts, so that where a trust has a purpose of relieving poverty, and these trusts were established before the commencement of the Charities Bill 2013 and were registered with the ACNC, this purpose will be treated as being for the public benefit following the commencement of the Charities Bill 2013. *[Schedule 2, item 6 of the Consequential Amendments Bill]*

2.38 Minor changes are made to the wording in Division 30 of the ITAA 1997 relating to public funds established and maintained for the purpose of relieving the necessitous circumstances of one or more

individuals who are in Australia. The effect of this general DGR category item is unchanged. *[Schedule 1, items 24 and 25]*

#### **Minor consequential changes**

2.39 A number of minor changes are made to the *A New Tax System (Goods and Services Tax) Act 1999*, the ACNC Act, the *Fringe Benefits Tax Assessment Act 1986*, the ITAA 1997, and the *Social Security Act 1991* to recognise that:

- the existing four categories of charitable purpose have been expanded to 12 categories of charitable purpose; and
- the relief of poverty, sickness or the needs of the aged now forms part of the charitable purpose of advancing social or public welfare.

*[Schedule 1, items 5, 6, 8, 9, 15 to 18, 36, 37 and 40 to 42 of the Consequential Amendments Bill]*

2.40 Amendments are made to the *Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Act 2013* if enacted. Further information about the transitional arrangements is below. *[Schedule 1, items 45 to 47 of the Consequential Amendments Bill]*

#### **Cy pres and cy pres-like schemes**

2.41 The Charities Bill 2013 allows *cy pres* and other similar schemes to be taken account of in determining charity status under Commonwealth law. The Consequential Amendments Bill contains an amendment which extends that treatment to the ACNC Act. This ensures that, consistent with the Charities Bill 2013, if a *cy pres* or similar scheme applies:

- non-charitable purposes of a mixed purpose trust are disregarded in determining if it is charitable; and
- the Charities Bill 2013 and the ACNC Act apply consistently to such trusts.

*[Schedule 1, item 7 of the Consequential Amendments Bill, subsection 25-5(6)]*

### **Application and transitional provisions**

2.42 The Consequential Amendments Bill generally applies from 1 January 2014, being the date that the Charities Bill 2013 commences. *[Clause 2 of the Consequential Amendments Bill]*

2.43 However, the inclusion of the definition of not-for-profit entity, which will be included in the income tax law by the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 is contingent on the commencement of the Charities Bill 2013 and the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012. If the Tax Laws Amendment (Special Conditions

for Not-for-profit Concessions) Bill 2012 does not commence then the meaning of not-for-profit entity takes its ordinary meaning. *[Schedule 1, item 44 of the Consequential Amendments Bill]*

2.44 Similarly, consequential amendments in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 are redundant if amendments in the Consequential Amendments Bill have already taken effect. This reflects that both Bills make conflicting amendments to the same provisions.

2.45 Accordingly, the amendments to section 50-20 and subsection 50-110(5) of the ITAA 1997 in the Tax Laws Amendment (Special Conditions for Not-for-profit Concessions) Bill 2012 do not take effect if the Consequential Amendments Bill commences prior to that Bill.



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# **Statement of Compatibility with Human Rights**

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## **Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011***

### ***Charities Bill 2013 and Charities (Consequential Amendments and Transitional Provisions) Bill 2013***

3.1 These Bills are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview**

3.2 The Charities Bill 2013 (the Bill) and the Charities (Consequential Amendments and Transitional Provisions) Bill 2013 introduce a definition of charity and charitable purpose for the purposes of all Commonwealth legislation.

3.3 The Government announced in the 2011-12 Budget that it would introduce a statutory definition of charity based on the 2001 *Report of the Inquiry into the Definition of Charity and Related Organisations*, also taking into account later judicial decisions.

3.4 The meaning of charity and charitable purpose has not previously been comprehensively defined in statute for the purposes of Commonwealth law. The meaning has been determined based on over 400 years of common law. The statutory definition largely preserves the common law principles with modifications to modernise and provide greater clarity and certainty about the meaning of charity and charitable purpose.

#### **Human rights implications**

3.5 The Bill engages three separate human rights under the International Covenant on Civil and Political Rights (ICCPR): the right to freedom of expression; the right to take part in public affairs; and the right to equality and non-discrimination.

3.6 Human rights do not apply to charities, only individuals. The Bill does not restrict individuals — it places limitations at the entity level, but only in respect of eligibility for registration under a voluntary regulatory framework. Human rights are only engaged to the extent that the Bill impacts on individuals involved with charities. Individuals are

free to engage in behaviours restricted by the Bill by means other than collectively through a charity.

3.7 Registering a charity under the Bill is voluntary. The primary reason that a charity would seek registration would be to access the associated tax concessions. Entities are not required to comply with the limitations under the Bill unless they choose to register as a charity.

3.8 The Bill largely reflects the current requirements on charities under the common law.

### **Right to freedom of expression**

3.9 The right to freedom of expression is contained in article 19 of the ICCPR. The right to freedom of expression ‘includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice’ (article 19(2)). Under article 19(3), the right may be limited by law, where those limitations are necessary for the respect of the rights or reputations of others; for the protection of national security or of public order; or of public health or morals.

3.10 This right is engaged because the definition of charity provides that an entity which is a charity must not have any of the **disqualifying purposes** set out in section 11 of the Bill.

3.11 The Bill is consistent with the right to freedom of expression.

3.12 Limitations on registered charities do not engage human rights. Human rights are only engaged to the extent that an entity which is able to access the regulatory framework and tax concessions available to charities will offer greater benefit to individuals in furthering charitable purposes than an entity which operates outside that framework and without those concessions.

3.13 Disqualifying purposes in the Bill are: the purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy; or the purpose of promoting or opposing a political party or a candidate for political office. The meaning of these disqualifying purposes is discussed in the explanatory memorandum at paragraphs 1.102 to 1.111.

3.14 Activities engaged in by a charity will not necessarily constitute a purpose of that charity, that is, a charity may engage in an activity without having the purpose of engaging in that activity. For example, a charity may produce ‘score cards’ setting out how a particular party’s policies aligns with the charity’s aims and this is unlikely to constitute a purpose of that charity.

3.15 The disqualifying purposes provisions set out in the Bill are necessary for the protection of public order and national security, and they constitute a reasonable and proportionate way of achieving this protection. They reflect the common law.



3.16 First, charities must not have a purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy. This restriction is currently imposed by the common law. Although ‘public policy’ is not defined, the Bill clarifies that it refers to matters such as the rule of law, the system of government of the Commonwealth, the safety of the general public and national security.

3.17 The right to freedom of expression is engaged because individuals cannot use a charity to further a purpose of engaging in, or promoting these activities. This is necessary for the protection of public order and national security because it restricts individuals from using charities to engage in or promote certain activities, such as illegal activities, or activities which threaten national security.

3.18 This limitation on registration is reasonable and proportionate because:

- individuals may engage in, or promote, these activities through other means (although they may contravene other laws);
- activities are not contrary to public policy merely because they are contrary to government policy; and
- it does not affect the ability of individuals to use charities to promote a change in the law. Promoting a change to any matter established by law is a charitable purpose under section 12 of the Bill, where that promotion or opposition relates to one of the other charitable purposes listed in section 12.

3.19 Second, charities must not have a purpose of promoting or opposing a political party or a candidate for political office. This is an existing limitation on charities imposed by the common law, and is necessary for the protection of public order. It promotes the integrity of both the electoral system and the not-for-profit sector by preventing both the system and the sector from misuse by people seeking to obtain a tax benefit. Further it preserves and protects the independence of the charitable sector.

3.20 This limitation on the purposes of a registered charity is reasonable and proportionate. As noted in paragraph 1.105, charities may still engage in activities such as policy debates, advocacy or lobbying activities to further charitable purposes, or publishing comparisons of party policies and how they align with their charitable purpose. They may have a purpose, including a sole purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth, a state, a territory or another country may be a charitable purpose.

3.21 The Bill enables entities to generate and engage in public debate with fewer restrictions than the provisions relating to political purposes in comparable overseas jurisdictions such as the United Kingdom and New Zealand where such purpose may be only incidental or ancillary to another charitable purpose.

3.22 The engagement of charities in electoral activities may also have consequences under electoral laws. (See paragraph 1.110.)

3.23 As discussed above, this restriction on charities through disqualifying purposes is a reasonable, necessary and proportionate step towards ensuring the integrity of the not-for-profit sector.

### **Right to take part in public affairs**

3.24 The right to take part in public affairs is contained in article 25 of the ICCPR. Relevantly, article 25 provides that ‘every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives’. None of the distinctions mentioned in article 2 of the ICCPR are relevant to these provisions of the Bill.

3.25 This right is engaged in the same context as the right to freedom of expression: because the definition of charity provides that an entity which is a charity must not have any of the disqualifying purposes set out in section 11 of the Bill. These rights are closely linked.

3.26 Requiring charities to not have any disqualifying purposes is consistent with the right to take part in public affairs, and pursues the legitimate objectives of protecting public order and ensuring the integrity of the not-for-profit sector.

3.27 The objective of protecting public order is discussed above in relation to freedom of expression, and the same arguments apply to the right to take part in public affairs. The relevant provisions are reasonable restrictions based on objective criteria.

3.28 As discussed above in relation to freedom of expression, charities may still engage in activities such as policy debates, advocacy or lobbying activities to further charitable purposes, or publishing comparisons of party policies and how they align with its charitable purpose. Charities may play a significant role in public affairs, and are free to have the purpose of promoting or opposing laws, policies, and practices, where this aids an existing charitable purpose.

3.29 The disqualifying purpose of engaging in, or promoting, activities that are unlawful or contrary to public policy reflects the common law. It promotes the integrity of the not-for-profit sector by bringing the purposes of charities in line with public expectations, and ensuring that those charities do not have a purpose which is detrimental to

Australian public policy and society. The Bill notes that activities are not contrary to public policy merely because they are contrary to government policy.

3.30 This provision does not prevent a charity from promoting a change to the law which is relevant to an existing charitable purpose. A purpose of promoting or opposing a change to any matter established by law, policy or practice in respect of an existing charitable purpose may itself be a charitable purpose. For example, although a charity could not have the purpose of promoting an illegal act, it may campaign for a change to that law, if such a change is in furtherance or in aid of one of the other charitable purposes listed in section 12.

3.31 Individuals are not bound by the Bill, and are free to participate in public affairs through other means. Individuals may also act collectively through entities other than charities.

3.32 The disqualifying purpose of promoting or opposing a political party or a candidate for public office promotes the not-for-profit sector by ensuring that the tax concessions associated with charities are not used for a political party or individual candidate's political benefit or detriment.

3.33 This would be inconsistent with the goals of the regulatory frameworks for the not-for-profit sector, and could undermine public confidence in the independence of the sector if such disqualifying purposes were permitted as charitable purposes.

3.34 As explained in paragraph 3.21 the provisions in the Bill relating to generating and engaging in public debate are less restrictive than in comparable overseas jurisdictions.

### **Right to equality and non-discrimination**

3.35 Article 26 of the ICCPR provides: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination of any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.'

3.36 Distinction based on race is permissible if it constitutes legitimate differential treatment. The United Nations Human Rights Committee has noted in General Comment 18 that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.

3.37 As explained in paragraphs 1.89 to 1.94, the Bill creates differential treatment to address a circumstance particular to Indigenous

individuals which may otherwise prevent them from meeting a public benefit test.

3.38 The requirement that a purpose be for the public benefit generally prevents entities which limit benefits to persons who are related from being charitable as such limits are not in the public benefit (a core part of charity).

3.39 However, entities may be required to provide benefits only to related Indigenous individuals where the entity manages, holds or receives property or payments related to native title or traditional land ownership, occupation, use or enjoyment rights.

3.40 The Bill allows for the purpose of an entity in these circumstances to be treated as being for the public benefit if the only reason that the purpose is not for the public benefit is because the beneficiaries are related.

3.41 The potential disadvantage arises because the common law does not allow for the special circumstances relating to native title benefits and the traditional relationships existing between Indigenous individuals. The differential treatment is intended to rectify any disadvantage caused by the operation of the public benefit test.

3.42 The differential treatment is based on reasonable and objective criteria: it applies to the specific circumstances that create the disadvantage. That is, where any entity which has property or payments relating to native title or traditional land ownership or use has a purpose that directs benefits to Indigenous individuals only, and which does not meet the public benefit test solely because the individuals to whose benefits the purpose is directed are related to one another.

3.43 The differentiation is a proportionate response because it is limited to the specific circumstances where an entity would fail the public benefit test due only to particular restrictions on who may hold or receive benefits. The relevant entities must still meet all other requirements of the definition of a charity.

## **Conclusion**

3.44 These Bills are compatible with human rights.

**Assistant Treasurer, The Hon David Bradbury**

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# ***Index***

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## **Charities Bill 2013**

<i>Bill reference</i>	<i>Paragraph number</i>
Sections 1, 2 and 3	1.20
Paragraph 4 (1) (b) and subsection 4(2)	1.54
4(1)(c)	1.55
Paragraph 4(1)(a)	1.53
Paragraphs 5(a) to (d)	1.21
Paragraph 5(a)	1.23
Paragraph 5(b)	1.24
Note 1 in paragraph 5(b)	1.28
Paragraph 5(d)	1.51
Paragraph 6(1)	1.56
Paragraph 6(2)(a)	1.58
Subsection 6(2)(a)	1.61
Paragraph 6(2)(b)	1.62
Paragraph 6(3)(a)	1.68
Paragraph 6(3)(b)	1.74
Subsection 6(4)	1.63
Section 7	1.79, 1.85
Paragraph 7(b)(c) and (e)	1.80
Paragraph 7(d)	1.81
Section 7 and Note 1, section 14 and subsections 15(1) and (2)	1.83
Section 8	1.87, 1.88
Section 9	1.92
Section 10	1.95
Paragraph 11(a) and Note	1.103
Paragraph 11(b)	1.104, 1.108
Paragraph 11(b) and paragraph 12(1)(l)	1.105
Paragraph 12(1)(a)	1.118
Paragraph 12(1)(b)	1.119
Paragraph 12(1)(c)	1.124
Paragraph 12(1)(d)	1.133

<i>Bill reference</i>	<i>Paragraph number</i>
Paragraph 12(1)(e) and section 16	1.134
Paragraph 12(1)(f)	1.135
Paragraph 12(1)(g)	1.138
Paragraph 12(1)(h)	1.139
Paragraph 12 (1)(i)	1.140
Paragraph 12(1)(j)	1.141
Paragraph 12(1)(k) and Charities (Consequential Amendments and Transitional Provisions) Bill 2013, Schedule 2, item 7	1.114
Paragraph 12(1)(k), Charities (Consequential Amendments and Transitional Provisions) Bill 2013, Schedule 2, item 7	1.143
Paragraph 12(1)(l)	1.149
Subsection 12(2)	1.150
Subsection 12(3)	1.113
Section 13	1.152
Subsection 15(3)	1.126
Subsection 15(4)	1.127
Paragraph 15(4)(a)	1.130
Section 17	1.139
Paragraph 18(a)	1.153
Paragraph 18(b)	1.157
Clause 2 of the Consequential Amendments Bill	2.42

## **Charities (Consequential Amendments and Transitional Provisions) Bill 2013**

### **Clauses**

<i>Bill reference</i>	<i>Paragraph number</i>
Clause 2	2.42

### **Schedule 1: Consequential amendments**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 7 of the Consequential Amendments Bill	2.16
Item 7 of the Consequential Amendments Bill, subsection 25-5(6)	2.41
Items 10 to 13 of the Consequential Amendments Bill	2.8

<i>Bill reference</i>	<i>Paragraph number</i>
Items 19 to 23, and items 26 to 35 of the Consequential Amendments Bill	2.33
Items 24 and 25	2.38
Item 43 of the Consequential Amendments Bill	2.9
Item 44 of the Consequential Amendments Bill	2.43
Items 45 to 47 of the Consequential Amendments Bill	2.40

## **Schedule 2: Transitional provisions**

<i>Bill reference</i>	<i>Paragraph number</i>
Item 1 of the Consequential Amendments Bill	2.26
Items 1, 2, to 4, 14, 38 and 39 of the Consequential Amendments Bill	2.7
Subitems 2(1) and (2) of the Consequential Amendments Bill	Table 2.1
Subitem 2(3) of the Consequential Amendments Bill	2.20
Item 3 of the Consequential Amendments Bill	Table 2.2
Subitems 3(1) and (2)	2.24
Subitem 3(4) of the Consequential Amendments Bill	2.23
Item 4 of the Consequential Amendments Bill	2.34
Item 5 of the Consequential Amendments Bill	2.35
Items 5, 6, 8, 9, 15 to 18, 36, 37 and 40 to 42 of the Consequential Amendments Bill	2.39
Item 6 of the Consequential Amendments Bill	1.77, 2.37
Item 6 of the Charities (Consequential Amendments and Transitional Provisions) Bill 2013	2.13
Item 7 of the Consequential Amendments Bill	2.13





