

## Submission on *Equal Opportunity Act* Review

Ian Murray<sup>1</sup>

Thank you for the opportunity to respond to the Discussion Paper on the Review of the *Equal Opportunity Act 1984* (WA) (**Discussion Paper**).

I am a charity law academic with a research interest in the regulation of charities: <https://research-repository.uwa.edu.au/en/persons/ian-murray-2>. I write in that capacity and note that this submission reflects my personal views and not those of the University of Western Australia.

This submission focuses on questions 69 and 70 raised by the Commission:

69. Should the scope of the exception contained in section 70 of the Act (exception for charities) be amended, and if so, how?

70. Should a statutory definition of 'charity' be inserted into the Act, and if so, how should 'charity' be defined?

The reasoning and proposed proportionality approach are also relevant to questions 71, 73 and 74 relating to sections 71 and 72(d) of the *Equal Opportunity Act*.

Each year or so when I teach not-for-profit law, *Kay v South Eastern Sydney Area Health Service* [2003] NSWSC 292 – decided on the basis of provisions very similar to section 70 – demonstrates the fundamental flaws with section 70. The facts are simple: Ms Williams left her property to several hospitals, a hospital association and a guide dog association. In doing so, Ms Williams stated (the emphasis being set out in the will):

I give The Children's Hospital at Randwick \$10,000 for treatment of White babies...

If Stephen Kay [the executor] wants to sell the house he must sell it to a young White Australian Couple for a reasonable price & not sell at auction or to a developer.

This expressly racially discriminatory gift was held to be a valid charitable trust for the advancement of health and was held to fall within the New South Wales and Commonwealth equivalents of section 70 of the *Equal Opportunity Act*.<sup>2</sup> The outcome is that the trust will continue (forever) retaining the racially discriminatory conditions and, despite equality legislation, requiring the trustee to act each year to check that funding is provided only to white babies. The reasoning suggested a net benefit to society due to the extra \$10,000 given to charity (and the assumption that the hospital would allocate the funding saved by this gift to non-white babies), without any discussion of the potential costs to society of statutory and court endorsement of racial discrimination.<sup>3</sup>

I would expect the same outcome under the law applying to charitable trusts in Western Australia and section 70 of the *Equal Opportunity Act*.

<sup>1</sup> Associate Professor, University of Western Australia Law School.

<sup>2</sup> *Racial Discrimination Act 1975* (Cth) s 8(2); *Anti-Discrimination Act 1977* (NSW) s 55.

<sup>3</sup> [2003] NSWSC 292, [19] (Young CJ).

## 1. Recommendations

- 1.1. Section 70 should be amended to narrow the exemption by incorporating a proportionality test. This will better promote:
  - *Equal Opportunity Act* objects of eliminating discrimination and promoting recognition and acceptance within the community of equality – on a range of grounds in a range of covered areas; and
  - Charity law objectives of achieving public benefit and ensuring public trust and confidence in the charity sector.<sup>4</sup>

At the same time, a proportionality test minimises state interference in the conduct of charities, ensuring material independence for the sector.

- 1.2. Consideration should be given to adopting the *Charities Act 2013* (Cth) definition of charity for the purposes of section 70 – as part of a broader process. Although section 70 clearly currently employs the general law definition of charitable purpose, harmonisation of the definition should result in material compliance and administration cost savings and greater public trust and confidence in the charity sector. However, any such change should be considered in light of the large number of other pieces of Western Australian legislation that rely on the general law definition. Definitional harmonisation across this legislation does **not** automatically require state tax concessions to be dictated by the Commonwealth.
- 1.3. Consideration should be given to whether sections that are similar to section 70 should be limited by way of a proportionality requirement in a similar way. For instance, sections 71 and 72(d). Taking section 72(d) in particular, religious purposes are typically also charitable purposes, and one could read the following section 72(d) references as being a statutory identification of a ‘legitimate aim’: ‘an act or practice that conforms to the doctrines, tenets or beliefs of that religion or is necessary to avoid injury to the religious susceptibilities of that religion’. What would convert section 72(d) into a proportionality test is to require that the particular act or practice be a proportionate means of achieving that aim of conformity to doctrines or avoidance of injury.

## 2. Section 70

As identified by the Commission, there are some benefits from the exemption in section 70. It can assist charities to direct benefits to groups of people who have been subject to discrimination and who have therefore potentially been subject to historical and structural disadvantages. There are already a range of positive discrimination exemptions in the *Equal Opportunity Act*, but they do not cover all grounds in all circumstances and so by further enabling positive discrimination section 70 can promote substantive equality,<sup>5</sup> which is of public benefit. Further, by providing a clear and simple exemption for charities, administration costs are reduced, permitting more charity resources to be used to produce benefits. The New South Wales and

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<sup>4</sup> For a summary discussion of these charity law objectives, see Ian Murray, *Charity Law and Accumulation* (Cambridge University Press, 2021) 25-30.

<sup>5</sup> See, eg, Jennifer Sigafoos, ‘When Should Charities be Allowed to Discriminate’ in John Picton and Jennifer Sigafoos (eds), *Debates in Charity Law* (Hart, 2020) 103, 124-127.

Victorian exemption rationales noted by the Commission also point to a further advantage of section 70. That is, it promotes certain rights that are relevant to the level of money flowing into the charity sector and to the charity sector's mode of pursuit of public good through voluntary association rather than the administrative and coercive practices of the state.<sup>6</sup> Those rights include freedom of disposition of property, freedom of association, freedom of expression and freedom of religion.

However, section 70 also has a dark side. It permits negative discrimination to the same extent as positive discrimination. And it takes account only of the benefits provided to charity recipients, not any countervailing detriments such as the entrenchment of structural disadvantages caused by societal endorsement of charity discrimination. These detriments undermine the objectives of the Equal Opportunity Act and reduce public trust and confidence in the charity sector.

## 2.1. Section 70 & proportionality

In liberal societies, such as Western Australia, state intervention to apply public norms in the private sphere to restrict one set of rights to prioritise others is typically justified by reference to proportionality (does a law have a legitimate objective and implement measures that are suitable and necessary to achieve that objective) and John Stuart Mill's harm principle (does the public benefit from advancing one set of rights outweigh the harm caused by limiting the other rights - as state coercion is justified to prevent harm).<sup>7</sup> A broad view of the harm principle would also take account of historical disadvantage experienced by groups and could justify state action to coerce or encourage action to improve the life options of those who have historically suffered discrimination: thus to create an environment that actively encourages positive discrimination.<sup>8</sup>

Following this approach, section 70 should not permit discrimination in providing benefits where the harm from doing so outweighs the benefits provided. Further, there is justification for explicitly endorsing positive discrimination in section 70. The *Equality Act 2010 c 15* (UK) provides an example of provisions that do just this, whilst also being sensitive to the need to protect charity and donor autonomy. I have set out only the first part of the section 193 charities exemption below:

- (1) A person does not contravene this Act only by restricting the provision of benefits to persons who share a protected characteristic if—
- (a) the person acts in pursuance of a charitable instrument, and
  - (b) the provision of the benefits is within subsection (2).

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<sup>6</sup> See, eg, Darryn Jensen, 'Charitable Purposes and Political Purposes (Or Voluntarism and Coercion)' (2015-16) 18 *Charity Law & Practice Review* 57; Matthew Harding, *Charity Law and the Liberal State* (Cambridge University Press, 2014) 78-85.

<sup>7</sup> John Gardner 'Liberals and Unlawful Discrimination' (1989) 9(1) *Oxford Journal of Legal Studies* 1, 1; Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) ch 6; Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth laws* (Report No 129, 2015) [2.63]; Harding, (n 6) 226-33.

<sup>8</sup> Gardner, (n 7) 17-19. See also Harding, (n 6).

(2) The provision of benefits is within this subsection if it is—

- (a) a proportionate means of achieving a legitimate aim, or
- (b) for the purpose of preventing or compensating for a disadvantage linked to the protected characteristic.

This example achieves a better balance between the benefits and harms of charity discrimination because, unless it involves positive discrimination, the charity wishing to discriminate must identify a legitimate aim from that discriminatory conduct and demonstrate that the discrimination is a proportionate means to achieve that aim. Additionally, the need to articulate the reasons for discrimination in this way is likely to bolster public trust and confidence in the charity sector.

Two UK cases demonstrate how such a provision might achieve more balance than the current fairly one-sided section 70.

*R v Hackney London Borough Council*<sup>9</sup> is a Supreme Court case that concerned whether the Agudas Israel Housing Association (AIHA) could rely on section 193 to provide social housing in preference to members of the Orthodox Jewish community. Under an arrangement with Hackney London Borough Council, AIHA provided social housing to applicants nominated by the Council. The Council's practice was to generally only nominate Orthodox Jewish applicants and this accorded with the objects in AIHA's constitution which required it to provide social housing first to members of the Orthodox Jewish community. The case arose because a non-Jewish single mother of four was identified by the Council as having the highest level of housing need in the Council area. A 1.5 year wait ensued for the mother and her children, during which time AIHA placed several lower-need applicants in housing. The applicant argued that AIHA (and the Council) had breached the *Equality Act 2010* (UK) and AIHA relied on the section 193 exception for charities.

The Supreme Court held that AIHA came within both of sections 193(2)(a) and (b) and found that AIHA's housing policy was proportionate and aimed at a legitimate end for several key reasons. First the Orthodox Jewish community experienced high levels of poverty and corresponding low levels of home ownership. This was connected to ongoing prejudice against Orthodox Jewish people in various areas of life, including rental of housing. Second, the Supreme Court balanced the benefits of AIHA's policy to Orthodox Jewish people as a group against the disadvantages experienced by other groups in society and noted that the housing stock held by AIHA amounted to only about 1% of the social housing stock in the Council area.

The other case is *Catholic Care (Diocese of Leeds) v Charity Commission for England and Wales*.<sup>10</sup> Catholic Care sought to amend its rules in order to be able to provide adoption services only to heterosexual couples within section 193. The Charity Commission for England and Wales refused to approve the amendment and Catholic Care appealed. The case applied section 193 to the proposed discriminatory activity in considering whether such an amendment should be permitted. Catholic

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<sup>9</sup> [2020] UKSC 40.

<sup>10</sup> [2012] UKUT 395.

Care argued that the legitimate aim was the adoption of more children and that its rule was a proportionate means because, without it, donors would not provide funds, it would close down and children would not be adopted. The Upper Tribunal did not accept this was a legitimate aim as the funding for adoption was provided by the state and there were a surplus of adoptive parents, such that other services were likely to step in if Catholic Care closed. Further, even if it had been a legitimate aim, then the balancing required by proportionality would have taken account of the harms to society from permitting discrimination. On the facts, section 193 did not permit the discrimination.

## 2.2. Section 70 & government outsourcing

The role of charities in delivering outsourced government functions was also raised in early submissions to the Commission. In theory, public norms such as equality norms, naturally apply to the state itself and thus it has been suggested that where charities are delivering government functions as a result of government outsourcing, perhaps the charity should be treated in much the same way as an organ of the state.<sup>11</sup> The problem with seeking to incorporate a rule like this in the *Equal Opportunity Act* is that the question here is really whether or not the service is being delivered by the state or by a private body. Charity law already contains rules that seek to distinguish government from charity. They may not always work well, but, at common law, they focus in large part on whether government controls the charity, or whether it can still engage in autonomous decision-making.<sup>12</sup> Rather than seeking to restate this test in a slightly different way in the *Equal Opportunity Act* – which would not be an easy task,<sup>13</sup> it would be better to address this through the broader approach of how to define charity, as discussed below. That broader approach would, if the *Charities Act 2013* (Cth) definition was adopted, also incorporate the multi-faceted government entity/charity distinction contained in the *Charities Act 2013* (Cth).

## 3. Definition

Over 41 Western Australian Acts refer to ‘charitable purposes’, ‘charity at law’, ‘charitable trust’, ‘charitable body’, ‘charitable organisation’, ‘charitable institution’, ‘charity’, ‘charitable’ estate or interest, ‘charitable’ work, or activities of a ‘charitable nature’.<sup>14</sup> Some define ‘charitable purpose’ or ‘charitable organisation’ – but typically

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<sup>11</sup> See, eg, Kathryn Chan, *The Public-Private Nature of Charity Law* 126-33, discussing ‘co-optation of charitable resources’ and the ‘functional public law-private law divide’; Debra Morris ‘Charities and the Modern Equality Framework – Heading for Collision?’ (2012) 65(1) *Current Legal Problems* 295, 328-30; Chiara Cordelli, The Institutional Division of Labor and the Egalitarian Obligations of Non-profits’ (2012) 20(2) *Journal of Political Philosophy* 131.

<sup>12</sup> *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, 181, 185-6, 187 (Gleeson CJ, Heydon and Crennan JJ applying a control test in the case at hand but leaving open the question of whether governmental control would always preclude charity status), 211 (Kirby J noting that some bodies forming a part of government might potentially be charitable).

<sup>13</sup> The ACNC’s 57 page explanation of the *Charities Act 2013* (Cth) definition of government entity probably says all that needs to be said about the difficulties of such a task: ACNC, Commissioner’s Interpretation Statement: Meaning of ‘Government Entity’ CIS 2016/01 <<https://www.acnc.gov.au/tools/guidance/commissioners-interpretation-statements/meaning-government-entity>>.

<sup>14</sup> *Associations Incorporation Act 2015* (WA); *Auction Sales Act 1973* (WA); *Building and Construction Industry Training Fund and Levy Collection Act 1990* (WA); *Charitable Collections Act*

only for use in that particular Act.<sup>15</sup> Details of some of these provisions are contained in the schedule to a 2016 ACNC paper that maps the definition of charity across the Australian jurisdictions.<sup>16</sup>

Placing aside the definition in the *Charitable Collections Act*, generally these references to the charity concept mean charitable as understood at general law, sometimes with the occasional tweak to add or remove particular classes of charities. That is, the conventional approach that courts have taken to construing references to ‘charitable purpose’ etc in state and federal legislation and even in the face of text and context that might, if the question arose afresh, provide a basis for adopting something other than the technical general law meaning of charity.<sup>17</sup> For instance, this is clear from the *Duties Act 2008* (WA) provisions which refer in various places to charitable purposes or institutions and then, in excluding certain charities from duty concessions, contain a savings provision:<sup>18</sup>

A reference to a relevant body [being a body that is excluded from the section 95(1) duty exemption for transactions that have been entered into for charitable purposes] is to any of the following- .... (d) a body... that promotes trade, industry or commerce, unless the

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1946 (WA); *Charitable Trusts Act 1962* (WA); *Chemistry Centre (WA) Act 2007* (WA); *Civil Liability Act 2002* (WA); *Competition Policy Reform (Western Australia) Act 1996* (WA); *Co-operatives Act 2009* (WA); *Criminal and Found Property Disposal Act 2006* (WA); *Duties Act 2008* (WA); *Electricity Corporations Act 2005* (WA); *Equal Opportunity Act 1984* (WA); *Food Act 2008* (WA); *Gaming and Wagering Commission Act 1987* (WA); *Guardianship and Administration Act 1990* (WA); *Health Services Act 2016* (WA); *Land Information Authority Act 2006* (WA); *Land Tax Assessment Act 2002* (WA); *Local Government Act 1995* (WA); *Lotteries Commission Act 1990* (WA); *Pay-roll Tax Assessment Act 2002* (WA); *Planning and Development Act 2005* (WA); *Police Act 1892* (WA); *Port Authorities Act 1999* (WA); *Private Hospitals and Health Services Act 1927* (WA); *Procurement Act 2020* (WA); *Property Law Act 1969* (WA); *Public Transport Authority Act 2003* (WA); *Racing and Wagering Western Australia Act 2003* (WA); *Redemption of Annuities Act 1909* (WA); *Retail Trading Hours Act 1987* (WA); *Sentence Administration Act 2003* (WA); *Stamp Act 1921* (WA); *Transport (Road Passenger Services) Act 2018* (WA); *Trustees Act 1962* (WA); *Uniting Church in Australia Act 1976* (WA); *Volunteers and Food and Other Donors (Protection from Liability) Act 2002* (WA); *Water Corporations Act 1995* (WA); *Western Australian Land Authority Act 1992* (WA); *Wills Act 1970* (WA).

<sup>15</sup> *Charitable Collections Act 1946* (WA) s5 (statutory definition that does not expressly depend on the general law); *Charitable Trusts Act 1962* (WA) s4 (defined by reference to the general law, though see extensions to the definition in ss 5, 22D; *Duties Act 2008* (WA) s 228; *Gaming and Wagering Commission Act 1987* (WA) s94(1) (which appears to adopt the general law concept of a charitable purpose and add to it); *Pay-roll Tax Assessment Act 2002* (WA) Glossary (which adopts the general law concept of a charitable purpose and removes some purposes from it); *Police Act 1892* (WA) s39E (adopts a hybrid approach – sometimes the general law concept is used, sometimes the definition in the *Charitable Collections Act*); *Stamp Act 1921* (WA) s76B(1) (adopts the general law concept, but in some circumstances defines a ‘charitable organisation’ as certain bodies that have Commonwealth income tax deductible gift recipient endorsement).

<sup>16</sup> ‘A Common Definition of Charity’ is available at:

<<https://www.acnc.gov.au/media/news/benefits-single-definition-charity>>.

<sup>17</sup> *Central Bayside General Practice Association Ltd v Commissioner of State Revenue* (2006) 228 CLR 168, [20] (Gleeson CJ, Heydon and Crennan JJ, see the discussion in footnote 6), [78]-[122] (Kirby J conducted an exhaustive discussion of whether to abandon the general law concept of charity in light of text and context and ultimately decided to stick with the general law concept); *City of Mandurah v Australian Flying Corps & Royal Australian Air Force Association (WA Division) Inc* [2016] WASCA 185, [48] (Martin CJ, Buss P and Newnes JA). See also *Aid/Watch Inc v FCT* (2010) 241 CLR 539 (2010), [23]-[24] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>18</sup> Section 96A(d). Similar provisions exist in other state tax legislation: *Land Tax Assessment Act 2002* (WA) s 38AA; *Pay-roll Tax Assessment Act 2002* (WA) s42A(d).

main purposes of the body are charitable purposes that fall within the first 3 categories (being relief of poverty, advancement of education and advancement of religion) identified by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as developed by the common law of Australia from time to time.

Thus, when section 70 of the *Equal Opportunity Act* defines ‘charitable benefits’ by reference to ‘purposes that are exclusively charitable according to the law in force in Western Australia’, this means the technical legal concept of charitable purposes contained in the general law. It does not incorporate the *Charitable Collections Act* definition.

### **3.1. What is the meaning of ‘purposes that are exclusively charitable according to the law in force in Western Australia’?**

What is the technical legal meaning of charitable purposes at general law? Putting certain disqualifying factors to one side,<sup>19</sup> there are two key requirements:

- The purposes must be the ‘relief of poverty’, the ‘advancement of education’, the ‘advancement of religion’, or ‘other purposes beneficial to the community’.<sup>20</sup> These purposes are typically referred to as the four ‘heads’ or ‘limbs’ of charity. The fourth limb is a general category determined by analogy with the authorities and the *Charitable Uses Act 1601*, 43 Eliz 1, c 4.
- The purposes (unless they are for the relief of poverty) must be for the public benefit. This means that the purposes must bestow an actual benefit,<sup>21</sup> and must do so in relation to the public or a section of the public rather than a private class of individuals.<sup>22</sup>

Two things should be noted about this definition. First, many charitable purposes have no necessary connection to relieving disadvantage. The technical legal meaning of charitable purpose imposes no requirement, for instance, that private (charitable) schools waive fees or support socio-economically disadvantaged students in pursuing the advancement of education. Hospitals that serve the wealthy sick and retirement villages for the wealthy aged are entirely consistent with the relief of the needs of age or illness. Cultural purposes such as the promotion of opera or ballet can be valid charitable purposes.

Second, the definition contains elements that, at first glance, seem apt to deal with the discriminatory activities of charities. In particular, charitable purposes must be of net benefit and must provide that benefit in relation to a section of the public. Further, purposes that are against public policy are not valid charitable purposes. Surely the gift in *Kay v South Eastern Sydney Area Health Service* should have been struck on

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<sup>19</sup> For instance, the purpose cannot be against public policy, or be governmental: *Royal North Shore Hospital of Sydney v A-G (NSW)* (1938) 60 CLR 396.

<sup>20</sup> *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 530 at 573 (Lord Herschell, Lord Watson agreeing), 583 (Lord Macnaghten, Lords Morris and Watson concurring); *Aid/Watch Incorporated v FCT* (2010) 241 CLR 539, [18] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

<sup>21</sup> *Re Pinion* [1965] Ch 85 at 107 (Harman LJ), 107–8 (Davies LJ), 109–11 (Russell LJ); *Gilmour v Coats* [1949] AC 426 at 446 (Lord Simonds).

<sup>22</sup> *Thompson v FCT* (1959) 102 CLR 315 at 321–3 (Dixon CJ, Fullagar and Kitto JJ in agreement).

any one of these bases? However, as Adam Parachin has shown,<sup>23</sup> these grounds are not very effective at addressing discrimination and so the result in *Kay* is entirely to be expected in similar circumstances. Charity law is ineffective for several reasons. Primarily, it focuses on purposes not activities.<sup>24</sup> Hence purposes that entail discriminatory activities but that do not explicitly seek to promote discrimination – eg a purpose of providing a retirement home for old Christian Scientists,<sup>25</sup> as opposed to a purpose of **reducing** acceptance of equality in the community – will typically be assessed at the purpose level that focuses on, eg relief of the aged (*City of Hawthorn*) or relief of sickness (*Kay*).

Further, in applying the ‘section of the public’ part of the public benefit test, courts are applying a ‘no-insider-benefit’ rule rather than seeking to enunciate rules of ‘publicness’. When it comes to the matter of ‘net benefit’, whilst this permits the weighing of benefits and detriments,<sup>26</sup> *Kay* demonstrates that courts are not particularly ready to give much weight to the broad societal impacts of discrimination – in that case the potential detriment from the state – through the courts – being perceived to endorse racial discrimination by enforcing a racially discriminatory trust. The public policy test has seen more success in North America in addressing discriminatory activities,<sup>27</sup> but is rightly criticised as giving insufficient guidance to judges (to be relied on as the primary means of addressing discrimination)<sup>28</sup> and in any event is hobbled in Western Australia by the existence of section 70 of the *Equal Opportunity Act*.

### 3.2. Should the *Equal Opportunity Act* meaning of charitable purposes be amended?

From my discussions with charities, students and lawyers, typically when they think of the meaning of ‘charity’ they think of either the dictionary definition of charity (ie the relief of poverty or disadvantage) or of the *Charities Act 2013* (Cth). Making the meaning of charitable purposes in the *Equal Opportunity Act* more explicit would help people better understand the legislation.

Lack of clarity of the definition in the *Equal Opportunity Act* and the existence of multiple inconsistent definitions at the state level and then as between Western Australia and the Commonwealth, increases compliance costs for charities and

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<sup>23</sup> Primarily from a Canadian perspective, but cognisant of charity law in the UK, Australia and the US: Adam Parachin, ‘Why and When Discrimination is Discordant with Charitable Status: The Problem with “Public Policy”, The Possibility of a Better Solution’ (2020) 6 *Canadian Journal of Comparative and Contemporary Law* 305. As Dal Pont’s discussion of the public policy ground shows, if anything, the general law concept of charity that applies in Western Australia is even less likely than that in Canada to invalidate charitable purposes that entail discrimination: Gino Dal Pont, *Law of Charity* (LexisNexis, 2<sup>nd</sup> ed, 2017) [3.46]-[3.52].

<sup>24</sup> Adam Parachin, ‘Regulating Charitable Activities through the Requirement for Charitable Purposes: Square Peg Meets Round Hole’ in J Picton and J Sigafos (eds), *Debates in Charity Law* (Hart, 2020) 129; Ian Murray, ‘How do we Regulate Activities Within a Charity Law Framework Focussed on Purposes?’ (2020) 26(2) *Third Sector Review* 65.

<sup>25</sup> *City of Hawthorn v Victoria Welfare Association* [1970] VR 205.

<sup>26</sup> *National Anti-Vivisection Society v Inland Revenue Commissioners* [1948] AC 31.

<sup>27</sup> Parachin, ‘Discrimination’, (n 23). For a recent Australian example of the weakness of the public policy test in a discrimination setting, see *Re Nesbitt* [2018] NSWSC 1456, [42] (Leeming JA, albeit judicial creativity still permitted partial access to a cy-prés scheme on other grounds).

<sup>28</sup> Parachin, ‘Discrimination’, (n 23); Murray, ‘How do we Regulate Activities’, (n 24).



administration costs for regulators, detracting from the ultimate goal of charity law – to enable and incentivise public benefit.<sup>29</sup> Multiple inconsistent definitions are also likely to reduce public trust and confidence in the charity sector due to inconsistent public recognition of charity status.<sup>30</sup>

Addressing these inconsistencies would, however, require change across most Western Australian legislation that refers to charities, not just the *Equal Opportunity Act*. If that sort of amendment is being investigated, there are likely to be advantages of adopting the *Charities Act 2013* (Cth) definition of charity for state purposes. Adopting that definition as the starting point would **not** stop Western Australia from retaining sovereignty over matters such as revenue concessions. The 2015 charity tax amendments in Western Australia provide an example as they quarantine tax concessions to some types of charity only. For instance, the *Taxation Legislation Amendment Act (No 2) 2015* (WA) removed land tax, payroll tax and duties exemptions for various classes of charities operating in Western Australia. It did so by identifying certain classes of charities as ‘relevant bodies’ that were ineligible for specific tax concessions.<sup>31</sup> The definition of ‘relevant body’ demonstrates the approach:<sup>32</sup>

- (a) a political party;
- (b) an industrial association;
- (c) a professional association;
- (d) a body, other than a body referred to in paragraph (a), (b), (c) or (e) that promotes trade, industry or commerce, unless the main purposes of the body are charitable purposes that fall within the first 3 categories (being relief of poverty; advancement of education and advancement of religion) identified by Lord Macnaghten in *Commissioners for Special Purposes of Income Tax v Pemsel* [1891] AC 531 as developed by the common law of Australia from time to time.
- (e) a body that is a member of a class of bodies prescribed for the purposes of this paragraph;
- (f) a body that [is a member of a pay-roll tax group, related body corporate, or that has a sole or dominant purpose of conferring a benefit on another relevant body].

Thus it is possible to start from the one definition of charity and then remove or add entities for each particular tax concession as desired, employing a model already in use in Western Australia.

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<sup>29</sup> Ian Murray, ‘Regulating Charity in a Federated State: The Australian Perspective’ (2018) 9(4) *Nonprofit Policy Forum* 34.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Taxation Legislation Amendment Act (No 2) 2015* (WA) ss 5 (new *Duties Act 2008* (WA) s 95(2)), 8 (new *Land Tax Assessment Act 2002* (WA) s 37), 13 (new *Pay-roll Tax Assessment Act 2002* (WA) ss 41(1A), 41(3A)). There is the potential for some relevant bodies to still receive tax concessions by applying for a ‘beneficial body’ determination by the Finance Minister, with the Treasurer’s concurrence.

<sup>32</sup> *Taxation Legislation Amendment Act (No 2) 2015* (WA) ss 4 (new *Duties Act 2008* (WA) s 3), 9 (new *Land Tax Assessment Act 2002* (WA) s 38AA), 14 (new *Pay-roll Tax Assessment Act 2002* (WA) s 42A).