



**Law Council**  
OF AUSTRALIA

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*Legal Practice Section*

# **Commissioner's Interpretation Statement: Health Promotion Charities**

**Australian Charities and Not-for-Profits Commission**

**14 September 2022**

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 90,000<sup>1</sup> lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12-month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Mr Tass Liveris, President
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The Chief Executive Officer of the Law Council is Dr James Pople. The Secretariat serves the Law Council nationally and is based in Canberra.

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<sup>1</sup> Law Council of Australia, *The Lawyer Project Report*, (pg. 9,10, September 2021).

## About the Section

The Legal Practice Section of the Law Council of Australia was established in March 1980, initially as the 'Legal Practice Management Section', with a focus principally on legal practice management issues. In September 1986, the Section's name was changed to the 'General Practice Section', and its focus broadened to include areas of specialist practices including Superannuation, Property Law and Consumer Law.

In December 2002, the Section's name was again changed to the 'Legal Practice Section', to reflect the Section's focus on a broad range of areas of specialist legal practices, as well as practice management.

The Section's objectives are to:

- contribute to the development of the legal profession;
- maintain high standards in the legal profession;
- offer assistance in the development of legal and management expertise in its members through training, conferences, publications, meetings and other activities; and
- provide policy advice to the Law Council, and prepare submissions on behalf of the Law Council, in the areas relating to its specialist committees.

Members of the Section Executive are:

- Ms Maureen Peatman, Chair
- Mr Geoff Provis, Deputy Chair
- Dr Leonie Kelleher OAM, Treasurer
- Ms Tanya Berlis
- Mr Mark Cerche
- Ms Peggy Cheong
- Mr Philip Jackson SC
- Ms Christine Smyth

The Section's administration team serves the Section nationally and is based in the Law Council's offices in Canberra.

## Acknowledgement

The Legal Practice Section acknowledges the assistance of its Charities and Not for Profits Committee in the preparation of this submission.

## Executive Summary

1. The Australian Charities and Not-for-profits Commission (**ACNC**) released a redraft of the Commissioner's Interpretation Statement: Health Promotion Charities (**HPC CIS redraft**) for consultation in late June 2022 together with a document setting out four questions on which the ACNC has sought comments (**consultation questions**).
2. This submission has been prepared by the Charities and Not for Profits Committee of the Law Council's Legal Practice Section (**Committee**). The Committee has prepared a separate submission dated 30 August 2022 in relation to the proposed new version of the Commissioner's Interpretation Statement which deals with Public Benevolent Institutions (**PBI CIS redraft**).
3. The Committee affirms the need to update the ACNC Commissioner's Interpretation Statement on Health Promotion Charities (**current HPC CIS**) in light of the decision in *Waubra Foundation and Commissioner for the Australian Charities and Not-for-profits Commission* [2017] AATA 2424 (**Waubra**). However, significant reworking of the redraft is required.
4. In response to the second consultation question, the Committee recommends that the introductory wording set out in the current HPC CIS be retained.
5. In response to the third consultation question, the Committee recommends that:
  - (a) the description of 'institution' in the current HPC CIS be retained; and
  - (b) the question about public control be removed from the charity registration application form.
6. Additionally, the Committee has identified other significant issues with the PBI CIS redraft and recommends:
  - (a) paragraphs 1.2 and 3.3 of the current HPC CIS be retained;
  - (b) paragraph 21 of the HPC CIS redraft be amended to read: 'An HPC may have a principal activity of promoting the prevention or the control of injuries, for example spinal injuries';
  - (c) the citation for the paragraph cited from *Waubra* in paragraph 16 of the HPC CIS redraft be included;
  - (d) for completeness, the following be added to the list of examples in paragraph 27 of the HPC CIS redraft: 'raising public awareness of the prevalence or risk of disease';
  - (e) paragraph 29 of the HPC CIS redraft be incorporated into paragraph 28;
  - (f) paragraph 32 of the HPC CIS redraft be deleted;
  - (g) in or after paragraph 33 of the HPC CIS redraft, an explanation of how back-office and supportive activities are to be treated in identifying the principal activity be inserted;
  - (h) example 3 be amended to illustrate that fundraising, and administration and other back-office functions should be apportioned across the other activities;

- (i) example 6 be amended by explaining that the fundraising activities are considered to be part of the activity of preventing and controlling strokes; and
- (j) example 4 be amended to explain that the road safety charity may qualify as a health promotion charity because its principal activity is the prevention of injuries that can lead to a variety of diseases, or replace it with a different example.

## Introduction

7. This submission responds to consultation questions 2 and 3, which are relevant to Health Promotion Charities (**HPCs**) and provides additional feedback on several other matters.

## Consultation questions relevant to HPCs

### Question 2

Which introductory statement do you consider more appropriately reflects the position of Commissioner's Interpretation Statements as guidance documents?

8. The proposed changes in wording the introductory statement have the following effects:
  - (a) the revised version removes the protection that a charity can expect when relying on a CIS—that is, to be treated fairly, consistent with the objects set out in the ACNC Act and the published regulatory approach of the ACNC;
  - (b) the revised version removes the assurance that, where the law or the ACNC interpretation changes, the changes will not be applied retrospectively to disadvantage a charity; and
  - (c) the revised version removes the assurance that if the law changes, the ACNC will apply the new position from the date of the change, and implies instead that if the law changes, the ACNC will apply the new position only once the Interpretation Statement has been updated.
9. These changes are a material shift in the regulatory approach of the ACNC and constitute a withdrawal of reasonable protections for charities relying on the CIS.
10. While the Committee has no objection to the rewording of the introduction to improve clarity and welcomes the removal of the statement that CISs are binding on ACNC staff, it does not support the removal of protections for charities that follow CIS guidance.

#### Recommendation

- **Retain the introductory wording set out in the current HPC CIS.**

### Question 3

**To help explain and clarify the meaning of 'institution', should the principles expressed in *Pamas* be included in the two revised Commissioner's Interpretation Statements?**

11. In most instances the distinction between 'fund' and 'institution' has been removed from the *Income Tax Assessment Act 1997* (Cth). The line between the two terms is difficult, especially in the modern context where the activities may all be online and fundraising activities are considered sufficient to denote an institution. The ACNC

should only consider trusts that are ‘mere funds’ (that is, do not actively fund raise and passively make grants) to not be institutions.

12. In the Committee’s view, the paragraphs in the current HPC CIS are adequate. The issue of public control is not as relevant now with public accountability being available through the ACNC register. The Committee also considers that this question should be removed from the charity registration application.
13. It is also not clear to the Committee what ‘principles’ the ACNC considers are expressed in *Pamas Foundation v Commissioner of Taxation (Pamas)*.<sup>2</sup> It should be noted that:
  - (a) *Pamas* is often misinterpreted as standing for the proposition that ‘a structure controlled and operated by family members and friends’ cannot be an institution; and
  - (b) *Pamas* considered the meaning of the term ‘religious institution’.
14. In the Committee’s view, the following examples demonstrate *Pamas* being misinterpreted as standing for the proposition that ‘a structure controlled and operated by family members and friends’ cannot be an institution:
  - Taxation Ruling 2003/5 which stated that ‘the word institution has a meaning ‘greater than a structure controlled and operated by family members and friends’;<sup>3</sup>
  - Taxation Ruling 2004/8 which stated that an HPC ‘must be an institution, and not an entity established, controlled and operated by family members and friends...’;<sup>4</sup>
  - Taxation Ruling 2011/4 which states that ‘[a] structure with a small and exclusive membership that is controlled and operated by family members and friends and undertakes limited activities is not an institution’;<sup>5</sup> and
  - Taxation Ruling 2019/3 which states that ‘[a] structure which conducts activities of limited scale, controlled and operated by family members or friends is not an ‘institution’ in this context’.<sup>6</sup>
15. In the Committee’s view, each of these Taxation Rulings rely on and inappropriately apply *Pamas*. *Pamas* was decided on the basis of a particular fact situation, which included that the Foundation was closely integrated with the business affairs of a Dr Staer; was substantially engaged in commercial activity; and had small scale activities. The governing document of the Foundation also entrenched family control, providing that the Chairman and Secretary (Dr Staer and his wife) could only be removed by a 75 per cent majority vote, death or retirement. Although these factors are summarised in *Pamas* at paragraph 126 with specific reference only to the scale of activities and whether the entity was closely held, all of the factors were arguably taken into account by the Court.

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<sup>2</sup> (1992) 35 FCR 117 (*‘Pamas’*).

<sup>3</sup> Paragraph 91.

<sup>4</sup> Paragraph 16.

<sup>5</sup> Paragraph 24.

<sup>6</sup> Paragraph 9.

16. This holistic approach, which requires consideration of factors other than simply whether the entity is controlled by family members and friends, is evident from the judgment itself, in which Beaumont and Lee JJ stated (emphasis added):

*The Foundation has a small and exclusive membership which is limited to Dr Staer, his family and some close friends. The scale of its activities is relatively small. **Looking at the whole of the circumstances**, in our opinion, the Foundation is not a religious institution...<sup>7</sup>*

17. This approach was affirmed in *KinCare Community Services Ltd v Chief Commissioner of State Revenue (NSW) (KinCare)*, in which the Court held that, notwithstanding control by the Howie family, KinCare Community Services Inc was not a 'structure controlled and operated by family members and friends'.<sup>8</sup> In making these findings, Payne J distinguished *Pamas* by reference to a range of factors. Those factors go well beyond control by family and friends (including the scale of activities, integration with Dr Staer's business, nature of activities and source of funding), with Payne J stating (emphasis added):

*The facts found by French J, sitting as the Tribunal in that case, were far removed from the present case. The Pamas Foundation was a small and exclusive organisation. The scale of its activities was "relatively small". The Foundation was closely integrated with the business affairs of a Dr Staer. The Foundation was "substantially engaged in commercial activity". It was a vehicle for Dr Staer and his family to pursue "their Christian purposes". I find that KinCare was a body which was the recipient of millions of dollars from the Commonwealth and State Governments to pursue the important work of providing home care to the aged and disabled in our society and not a "structure controlled and operated by family members and friends" **of the kind addressed in Pamas.**<sup>9</sup>*

18. *Kincare* makes it clear that the fact that a structure is controlled and operated by family members and friends is only one factor to be taken into account when considering whether or not it is an institution.
19. Rather than explaining and clarifying the meaning of 'institution', including reference to *Pamas* in the PBI CIS may lead to the inappropriate exclusion of entities solely on the basis of close control rather than the holistic approach required by the case law.
20. Additionally, *Pamas* considered the meaning of the term 'institution' in the context of 'religious institution'. The category of HPC was introduced in recognition 'that there are charities that promote the prevention or control of diseases which did not come within the tax endorsement category of a public benevolent institution'.<sup>10</sup> The appropriate interpretation of 'institution' for the purposes of a HPC is therefore the interpretation applicable for PBIs. Caution is required when using a 'religious institution' case to interpret the term 'institution' for the purpose of 'public benevolent institution', a compound term that should properly be understood by reference to ordinary contemporary usage rather than a technical analysis of the individual words.
21. In the High Court decision of *Perpetual Trustee Co Ltd v Federal Commissioner of Taxation (Perpetual)* it was held that 'public benevolent institution' is not a term of art, is to be understood in its ordinary English usage, and does not have a fixed

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<sup>7</sup> *Pamas* at 126.

<sup>8</sup> *KinCare Community Services Ltd v Chief Commissioner of State Revenue (NSW)* [2019] NSWSC 182, [212] (Payne J) ('*KinCare*').

<sup>9</sup> *Kincare* at 212 per Payne J.

<sup>10</sup> Commissioner's Interpretation Statement: Health Promotion Charities CIS 2015/01.

meaning.<sup>11</sup> None of the judgments in *Perpetual* separate the term ‘public benevolent institution’ into its constituent parts, with Dixon J confirming that it is a ‘compound description’. McTiernan J (albeit in a dissenting judgment) expressly rejected the approach of ‘*piecing together the respective meanings of the three words of which [public benevolent institution] is composed*’.<sup>12</sup> Although some cases do consider the terms separately, in the Committee’s view, the approach in *Perpetual* should be preferred.

22. In light of the potential for *Pamas* to be misapplied and the fact that it is a ‘religious institution’ case, in the Committee’s view, including reference to *Pamas* in the HPC CIS redraft would not assist with the proper interpretation of the term ‘institution’ for the purpose of establishing whether an organisation is an HPC.

#### Recommendations

- **Retain the description of “institution” in the current HPC CIS.**
- **The question about public control should be removed from the charity registration application form.**

## Additional issues with the HPC CIS redraft

### Background section

23. The following clarifications found in paragraphs 1.2 and 3.3 respectively of the current HPC CIS are helpful and should be reinserted:

- *The introduction of the HPC category recognised that there are charities that promote the prevention or control of diseases which did not come within the tax endorsement category of a public benevolent institution (PBI).*
- *While it must have a charitable purpose, the ACNC does not consider that the purpose (or purposes) of the HPC need necessarily be the advancement of health. For example, a charity that is for the advancement of education that focuses its main educational activity on promoting safe sex in order to prevent sexually transmitted diseases can also be an HPC.*

#### Recommendations

- **Retain paragraphs 1.2 and 3.3 of the current HPC CIS.**

### Diseases in human beings

24. In paragraph 21 of the HPC CIS redraft *Healthy Cities Illawarra Inc v Commissioner of Taxation* [2006] AATA 522 is cited as authority for two statements about the question of

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<sup>11</sup> (1931) 45 CLR 224, 231.

<sup>12</sup> See also the decision of Starke J in *Public Trustee (NSW) v FCT* (1934) 51 CLR 75 at (para) “*it is to be treated as a compound expression*”.

whether ‘injury’ is included in the definition of “diseases”. This case is now outdated in light of *Waubra*:

- (a) The term ‘injury’ is now included in the definition of disease as set out in paragraph 17 of the HPC CIS redraft, in the extract from *Waubra*, citing Butterworths Medical Dictionary.
- (b) An injury would also meet the definition of disease in the extract from Dorland’s Illustrated Medical Dictionary which is also set out in paragraph 17 of the HPC CIS redraft, in the extract from *Waubra*.

#### **Recommendations**

- **Amend paragraph 21 of the HPC CIS redraft to read: “An HPC may have a principal activity of promoting the prevention or the control of injuries, for example spinal injuries.”**
- **Include the citation for the paragraph cited from *Waubra* in paragraph 16 of the HPC CIS redraft.**
- **For completeness, add the following to the list of examples in paragraph 27 of the HPC CIS redraft: “raising public awareness of the prevalence or risk of disease”.**

### **Promoting the prevention or control of diseases**

25. Paragraph 29 of the HPC CIS redraft should be incorporated into paragraph 8 as it is elaborating on the statement in paragraph 28 rather than being a new idea.

#### **Recommendation**

- **Incorporate paragraph 29 into paragraph 18 of the HPC CIS redraft.**

### **Principal activity**

26. Paragraph 32 of the HPC CIS redraft reads: ‘*To determine a charity’s principal activity, it is necessary to identify which activity takes up more of the charity’s time and resources than any other activity*’.

27. Paragraph 32 is not saying anything that has not already been said in the previous two paragraphs of the HPC CIS redraft, and it incorrectly implies that *Waubra* specifically stipulates that ‘time and resources’ are the (only) relevant measures of an organisation’s main activity. Further, the following paragraph in the HPC CIS redraft (paragraph 33) goes on to stipulate a whole range of factors (other than time and money) that are relevant to take into account when determining the principal activity.

#### **Recommendation**

- **Delete paragraph 32 of the HPC CIS redraft.**

28. In calculating a charity’s principal activity, the HPC CIS redraft should explain how it takes into account activities such as fundraising, administration and back-office functions. That is, it should clarify whether these are ignored when determining the principal activity on the basis that they are necessary overheads in order to engage in

activities of a charitable nature, rather than activities in their own right. Alternatively, it should clarify whether the better approach would be to explain that the time and expenditure should be apportioned amongst the other activities.

29. Examples 3 and 6 are not consistent with their treatment of these activities and there is nothing in the substantive part of the HPC CIS redraft dealing with this. Example 3 refers to and takes into account 15 per cent in fundraising and 15 per cent in administration whereas example 6 includes the 90 per cent of fundraising as part of the activity in preventing and controlling disease. Example 6 would seem to be the correct approach.

#### **Recommendation**

- **Insert in or after paragraph 33 of the HPC CIS redraft an explanation of how back-office and supportive activities are to be treated in identifying the principal activity.**
- **Amend Example 3 to illustrate that fundraising, and administration and other back-office functions should be apportioned across the other activities.**
- **Amend Example 6 by explaining that the fundraising activities are considered to be part of the activity of preventing and controlling strokes.**

30. Example 4 in the HPC CIS redraft describes a charity promoting road safety. The Committee submits that such a charity would be an HPC, on the following two bases:

(a) Injury giving rise to disease:

- (i) It is self-evident that injuries from road traffic accidents can lead to a variety of diseases. We submit that the analysis should be based on substance rather than form: just because a charity does not explicitly make the connection between road safety and disease on its website does not mean that its principal activity, as a matter of objective fact and taking a holistic view, is not the prevention and control of disease (via the prevention and control of injuries).
- (ii) This is an approach consistent with the principle expressed by the High Court in *Commissioner of Taxation v. Word Investments Ltd* as follows:

*“Similarly, the charitable purposes of a company can be found in a purpose of bringing about the natural and probable consequence of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequence of its immediate activities.”<sup>13</sup>*

(b) Injury as disease:

- (i) As pointed out above (paragraph 24), injuries should be regarded as meeting the definition of disease. As promoting road safety is obviously and objectively aimed at reducing injuries, it follows that promoting road safety is promoting the prevention of disease.

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<sup>13</sup> (2008) 236 CLR 204 citing from [2008] HCA 55 at [38] per Gummow, Hayne, Heydon and Crennan JJ.

31. It may be that the intention of Example 4 is to illustrate a case where the link between the activities of the charity and disease is tenuous, or not immediately apparent. Promoting bicycle riding might be a better example.

**Recommendation**

- **Amend Example 4 to explain that the road safety charity may qualify as a health promotion charity because its principal activity is the prevention of injuries that can lead to a variety of diseases, or replace it with a different example.**