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**AMNESTY INTERNATIONAL AUSTRALIA'S SUBMISSION ON
A DEFINITION OF 'CHARITY'**

Thank you for the opportunity to provide our comments in relation to The Treasury Consultation Paper – *A Definition of Charity*. Amnesty International Australia (**AIA**) considers that in light of recent common law decisions and the codification of the definition of 'charity' in overseas jurisdictions, the introduction of a statutory definition of 'charity' that is most appropriate to Australia, will provide certainty and potentially assist to reduce the administrative compliance burden required to prove or maintain an entity's charitable status.

Our comments to the questions set out in the Consultation Paper are considered in turn below. We would welcome the opportunity to discuss our responses with you further, if requested. For completeness, AIA has not provided comments in response to questions numbered 2,4,9,14 and 19.

Question 1: Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?

The consultation paper proposes to amend the Charities Bill 2003 (the **Bill**) to require that the purpose/s of a charity must be exclusively charitable. While AIA understands the need for certainty around which part of the assets of a charity would be applied for charitable as opposed to non-charitable purposes, AIA is concerned that replacing the 'dominant purpose' with an 'exclusively charitable' purpose requirement would impose a significant barrier to not-for-profit's (**NFPs**) (such as AIA) satisfying a statutory definition of 'charity'. To exclude NFPs from charitable status, if one of their purposes when viewed in isolation is non-charitable, would present considerable impediments to NFPs who have mixed purposes such as advocacy or changing law or policy (assuming political advocacy remains a 'disqualifying purpose' as it is in s 8 of the Bill). For example, if AIA's charitable purpose is considered to be the advancement of human rights, if it also has another purpose of changing laws or government policies (which is not considered charitable under s 8 of the Bill), under the 'exclusive purpose' test, AIA would lose its charitable status even if this non-charitable purpose was only a minor part of AIA's activities.

AIA submits that the 'dominant purpose' requirement of the Bill in which an entity meets the definition of 'charity' provided it has at least: (i) a dominant purpose that is charitable; and (ii) any non-charitable purposes of the entity further or are in aid of the dominant purpose, presents the most inclusive and practical criterion for determining when an entity may be considered to be a charitable body.

The amendment proposed in the Consultation Paper regarding an 'exclusive purpose' requirement for charities also specifies that any non-charitable purpose of the entity "could only be incidental or ancillary to the charitable purpose."¹ AIA submits that this new 'exclusive purpose' test is not sufficiently distinct from the 'dominant purpose' test set out in the Bill to warrant any change to the 'dominant purpose' test. The 'dominant purpose' test similarly requires that any non-charitable purposes of the entity must "further or [be] in aid of, and [be] ancillary or incidental to its purposes that are charitable."²

Amending the 'dominant purpose' requirement could also exacerbate existing confusion regarding the difference between a charity's purposes and the charity's activities, particularly if an entity's charitable status hinged on this distinction.

Question 2: Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?

AIA has no comment in response to this question.

Question 3: Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

AIA submits that further clarification of s 7(2) of the Bill is necessary, as the draft provision provides:

a purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible

Accordingly, the provision offers no guidance on how to assess whether a group of beneficiaries is numerically negligible or not. It cannot be inferred from the wording whether numerical negligibility is to be assessed on an absolute or on a comparative basis.

Although it seems in some cases reasonable to prevent organisations working for the benefit of only a small group (e.g. the members of a specific family, employees of a specific employer) from being regarded as charitable, introducing an absolute minimum of beneficiaries necessary to constitute a sufficient section of the general community, could exclude genuinely charitable purposes. For example when only few people are subject to a specific human rights infringement (e.g. a suppressed religious minority), the purpose of protecting this minority's rights (e.g. freedom of religion) still remains aimed at achieving a universal good, (namely the protection of human rights in general) which needs to be regarded as being charitable. Further problematical examples such as independent schools in geographically isolated communities or organizations working for the benefit of people affected by a rare disease are listed as examples in the Consultation Paper. AIA submits that introducing an absolute number as a minimal requirement to constitute a sufficient section of the general community is not a suitable way to distinguish between entities working for the public benefit, and those working only for the interests of a private group.

¹ 'The Definition of Charity Consultation Paper' October 2011, at paragraph 54.

² S. 6(1)(b) Exposure Draft Charities Bill 2003

It seems preferable to regard the test of numerical negligibility as being a comparative one. Following the recommendation of the Board of Taxation in its review of the Bill, 'sufficient section' might be defined as one which is not 'numerically negligible' compared with the size of that part of the community to whom the purpose would be relevant.

Following such a definition, the protection of a minority's human rights would constitute a purpose directed to a sufficient section of the general community as it is in fact directed to everyone to whom the purpose could be relevant (eg, all members of a specific religious group). Each person following this religious belief would be a potential beneficiary. The same reasoning would lead to regarding a school open for all children in a geographically isolated community and an organization working for the benefit of all people affected by a rare disease, as being for the 'public benefit'.

The distinction seems to be between such purposes directed to the benefit of a secluded group (a specific family or company) and those directed to the benefit of an open group to which everyone belongs who either voluntarily (religious belief, inhabitant of a geographically isolated community) or by chance (affected by a rare disease) fulfills the same criteria. While the former is directed to a private benefit only, the latter should be regarded as directed to the public benefit.

The meaning of 'public' and 'sufficient section of the general community' should be clarified by stating the test of numerical negligibility to be a comparative one and the openness or seclusion of a group of beneficiaries to be one of the main indicators to distinguish between a public opposed to a merely private benefit.

Question 4: Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

AIA has no comments in response to this question.

Question 5: Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

AIA firmly believes that 'the promotion, protection and defence of human rights' should be explicitly listed as a 'charitable purpose'³ and as a purpose for the 'public benefit'⁴ (ie, as part of the definition of a charity). By appearing in the legislation itself, rather than in guidelines or rulings, this would remove any doubt that donors, Australian taxpayers or the Public Trustee (in relation to testamentary bequests) may have as to the charitable status of AIA and other human rights organisations.

Further, this would create more clarity around these definitions and bring them in line with other common law countries such as England and Wales which in the *Charities Act 2006 (UK)* provides that a 'charitable purpose' includes:

³ For example in section 10(1) of the *Charities Bill 2003 (Cth)*.

⁴ For example in section 7 of the *Charities Bill 2003 (Cth)*.

the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity⁵.

Furthermore, human rights standards and instruments have been a key part of the international legal framework since 1948 when the United Nations General Assembly resolved to adopt the Universal Declaration of Human Rights (**UDHR**). Since this adoption, the Australian Government has ratified 'particular provisions' of seven core United Nations human rights treaties⁶ into domestic law. Examples include the *Human Rights Commission Act 1986 (Cth)*, *Native Title Act 1993 (Cth)*, *Industrial Relations Reform Act 1993 (Cth)*, *Sex Discrimination Act 1984 (Cth)*, *Family Law Reform Act 1995 (Cth)*, *Anti-Discrimination Act 1997 (NSW)* and the *Equal Opportunity Act 1984 (SA)*.

In addition, the recent launch by the Attorney-General of 'Australia's Human Rights Framework' (the **Framework**) is further support for the view that the 'promotion, protection and defence of human rights' is a purpose for the public benefit. The primary objective of the Framework is to further protect and promote human rights in Australia. To this end, one of the key commitments of the Australian Government is to require new Bills and legislative instruments introduced into Parliament to be accompanied by a statement of compatibility with Australia's international human rights obligations⁷. Another key commitment is to establish a new Parliamentary Joint Committee to report to Parliament on matters relating to human rights referred to it by the Attorney-General.

Accordingly, AIA submit that explicit recognition of the promotion of human rights for all human beings as being for the public benefit and consequently charitable is appropriate.

Question 6: Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit be preferable on the grounds it provides greater flexibility?

In AIA's experience, limited resources which otherwise could be directed towards achieving human rights outcomes are often expended on 'proving' that AIA is indeed a charity beyond the usual taxation compliance requirements (such as the charity taxation concession status) which requires the 'exempt entities provisions' in the *Income Tax Assessment Act 1997 (Cth)* to be satisfied.

By explicitly defining the advancement of human rights in the statutory definition of 'charity' (as opposed to relying on the common law and published guidance) this would remove the necessity for AIA to continually 'reprove' that its purpose is for the 'public benefit'.

⁵ Charities Act 2006 (UK), Part 2 (h) 'Appendix A: Definitions in Overseas Jurisdictions' in The Treasury, *A Definition of Charity*, Consultation Paper, October, 2011.

⁶ International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; International Convention on Economic, Social and Cultural Rights; Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel Inhumane or Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Rights of Persons with Disabilities.

⁷ *Human Rights (Parliamentary Scrutiny) Bill 2010* and the *Human Rights (Parliamentary Scrutiny) (Consequential Provisions) Bill 2010*

Question 7: What are the issues with requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit?

AIA submits that it is in the interests of the Australian taxpayers and donors to ensure that the organisations to which they donate and which derive a tax concession are in fact charities and thus for the public benefit.

It must however be borne in mind that taxpayers, donors and the charities themselves do not want to spend too great a proportion of that 'charitable dollar' on administrative costs, but rather on the beneficiaries of those charities. A balance must be struck between ensuring appropriate regulation and unnecessarily increasing a charity's administrative costs.

Greater clarification on when an entity's purpose is for the 'public benefit' (such as explicit recognition of the promotion and protection of human rights in the statutory definition of 'charity') will also reduce these unnecessary administrative costs.

Question 8: What role should the ACNC have in providing assistance to charities in demonstrating this test, and also in ensuring charities demonstrate their continuing meeting of this test?

AIA supports the move to overturn the presumption of public benefit for the first three heads of charity and require all entities seeking approval as a charity to meet the public benefit test as a means of increasing public confidence in the charitable sector. While the consultation paper suggests that little would be required by charities to demonstrate their compliance where the public benefit is self-evident, the Australian Charities and Not-for-Profits Commission (the **ACNC**) must provide clear guidance in the form of policy documents setting out in detail what is needed to demonstrate whether an entity is operating for the public benefit. This will not only provide clarity and certainty for charities, but also bring Australia in line with practice in overseas jurisdictions. The ACNC should also provide education and dedicated support services to assist charities with ongoing technical matters, such as how they can efficiently and effectively best demonstrate that the entity's purpose is for the public benefit.

Question 9: What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

AIA has no comment in response to this question as it is not established for the advancement of religion or education.

Question 10: Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purposes?

As a starting position, AIA considers it important for the regulation of the charitable sector that Australia maintains an 'activities' condition in any statutory definition of a 'charity'. However, AIA believes that any such condition should not be so restrictive that it imposes an excessive administrative burden on charities in complying with this requirement.

As discussed above, AIA does not support the replacement of the term 'dominant purpose' with an 'exclusively charitable purpose' test, and therefore objects to an alteration of the requirement set out in s 4 of the Bill to reflect this 'exclusive purpose' test.

AIA submits that in light of the restrictive nature of the 'exclusive purpose' test, any amendment regarding the activities engaged in by a charity to reflect this new test would inevitably involve further restrictions to

the activities a charity could and could not engage in. For instance, it is not clear that if such an amendment was introduced that a charity would be able to engage in activities that are not in aid of its charitable purpose, even if these activities are isolated or insignificant, as determined in Taxation Ruling: *Income tax and fringe benefits tax: charities (TR 2011/4)*.

AIA also submits the requirement of the Bill in s 4(1)(c) that a charity 'does not engage in activities that do not further or are not in aid of its dominant purpose' provides an appropriate test for judging the activities of a charity.

However, AIA also considers it extremely important that the language used in this section **does not** stipulate that a charity cannot engage in 'any' activities that do not further its charitable purpose (even if such activities are incidental or ancillary to its main activities). To do so could potentially impose significant administrative costs on charities to ensure that each and every one of its activities would not affect the charitable status of the entity.

Question 11: Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

Assuming the activities condition of s.4(1)(c) of the Bill is adopted (or words to the same effect) it is extremely important that such a reform also provide clarity around when activities are considered to 'further' or are 'in aid of' an entity's charitable purpose.

AIA asserts that a statutory definition should incorporate the criteria articulated in the High Court decision of *Commissioner of Taxation v Word Investments* [2008] HCA 55 (**Word Investments**) and TR 2011/4. To this end, the 'natural and probable' consequences of an entity's immediate activities must be examined.

Question 12: Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

AIA regards the generation of public debate concerning matters arising under the fourth head of 'other purposes beneficial to the community' as being itself a purpose beneficial to the community. The majority decision of the High Court in *Aid/Watch Incorporated and Commissioner of Taxation* [2010] HCA 42 (**Aid/Watch**)⁸ is support for this view. In this regard, their Honours at paragraphs 44-45 stated 'communication between electors and legislators and the officers of the executive, and between electors themselves, on matters of government and politics is "an indispensable incident"⁹ of the Australian legal system'. The system itself requires for its operation the "agitation" for legislative and political changes"¹⁰ Any burden which the common law places upon communication respecting matters of government and politics must be reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of that system of government.¹¹ Accordingly the purpose of attempting to change the law or government policy should not be seen as a disqualifying purpose (as provided in section 8 (2)(c) of the Bill) as long as it relates to matters arising under one of the established four heads of charity.

Further, as States are obliged to protect human rights by international treaties that they voluntarily enter into, it appears to be a necessary part of the democratic process and therefore clearly for the public benefit to insist on the fulfillment of these obligations by the respective government. In this case, campaigning for a change in the law in order to uphold protection of human rights is not related to advocating a specific

⁸ *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42.

⁹ *Ibid*, at 44.

¹⁰ *Ibid*, at 45.

¹¹ *Ibid*, at 44.

political cause. Rather, it is potentially one of the most effective ways to actually prevent future human rights' infringements by the State.

AIA submits that the principles of the High Court's Aid/Watch decision (ie, specifically allowing a charity to engage in political advocacy as long as it is in furtherance and in aid of its charitable purpose) should be incorporated into a statutory definition of 'charity'.

Further guidance might be included in the explanatory material with regards to the types of activities that will constitute legitimate political advocacy.

Question 13: Are there any issues with prohibiting charities from advocating a political party or supporting or opposing a candidate for political office?

AIA agrees that organisations working solely to promote or benefit a political party or a specific candidate for political office should not be regarded as a charity. Political parties or candidates should be covered by laws such as the *Commonwealth Electoral Act 1918 (Cth)*.

Organisations engaged in advocacy of the kind referred to in Aid/Watch should not, however, be precluded from advocating a particular party's or candidate's policy platform if it supports their charitable purpose and / or advocacy outcome. This is not to say that an organisation could adopt a partisan platform in its entirety and promote it. Rather, the organisation could, for example, promote those policies it deems consistent with its charitable purposes and activities, or rate each candidate according to his or her policies' compliance with that organisation's purposes. Otherwise such organisations would face severe difficulties in distinguishing between allowed engagements in a public debate and prohibited advocacy of a political party or candidate.

Question 14: Is further clarification required in the definition on the types of legal entity which can be used to operate a charity?

AIA has no comment in response to this question.

Question 15: In the light of the *Central Bayside* decision is the existing definition of 'government body' on the Charities Bill 2003 adequate?

AIA submits that the definition of 'government body' in the Bill needs to be further clarified in the explanatory material to ensure that entities that are significantly under the control and influence of the government (ie, they solely further the objectives of government, rather than their own purposes) do not gain the dual benefit of government funding and taxpayer support (in the form of tax concessions owing to their charitable status).

Questions 16 and 17: Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes and if not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

AIA submits that 'the promotion, protection and defence of human rights' should be specifically listed as a charitable purpose. Other common law jurisdictions such as England and Wales as well as Northern Ireland included the protection and promotion of human rights explicitly as a charitable purpose in their respective

legislation. In the explanatory material to the Bill it was listed as being one of the examples falling under Part 3, section 10(1)(g) 'any other purpose that is beneficial to the community'.

Millions of people worldwide engage in the advancement of human rights and millions of dollars are donated to this cause every year. There can be no question that the promotion and protection of human rights is publicly seen as being for the public benefit and is therefore charitable.

In order to clarify the law, the advancement of human rights should therefore be listed explicitly as being a charitable purpose.

Question 18: What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

AIA supports harmonisation of the definition of a charity which specifically includes the promotion and protection of human rights across Commonwealth, State and Territory laws. AIA as a national organisation has in the past, experienced situations where tax concessions in one state are granted but in other states are not. Differing approaches in different states in which we operate increases duplication and administrative costs which otherwise could be directed towards achieving human rights charitable purposes.

AIA submits that a single statutory definition of 'charity' be adopted across all Commonwealth, State and Territory laws.

Question 19: What are the current problems and limitations with ADRFs?

AIA has no comment in response to this question.

Question 20: Are there any other transitional issues with enacting a statutory definition of charity?

AIA agrees that whatever amendments are made to the definition of charity, an education program is required to ensure that charities are fully aware of any new compliance requirements.

AIA strongly believes that clear guidance is needed for entities that are already recognised as charities regarding the transition to the new charity definition. In particular, existing charities will need to be aware of whether their charitable status will be 'rolled over' or whether they will need to reapply for recognition as a charity. As any reapplication process will require administrative and financial expense, this should be made clear at the outset.

If Treasury accept that charities can engage in political activities, so long as those activities are in furtherance and aid of its charitable purpose, AIA submits that explanatory material or guidance by the ACNC be published on the types of political activity that an charity can engage in, well before the statutory definition of 'charity' is introduced on 1 July 2013.

AIA submit that any entity currently endorsed as 'charitable' for Commonwealth law purposes automatically satisfy the statutory definition of 'charity' for a period of two years. This will enable the entity time to better adapt its activities in accordance with the requirements of the statutory definition.

Yours sincerely

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