

Australia Council Submission to a Definition of Charity Consultation Paper

About the Australia Council for the Arts

The Australia Council for the Arts is the Australian Government's arts funding and advisory body.

Its mission is to enrich the lives of Australians and their communities by supporting the creation and enjoyment of the arts. This mission is underpinned by a commitment to:

- Excellent and distinctive Australian art - assisting Australian artists to create and present a body of distinctive cultural works characterised by the pursuit of excellence
- Access for all Australians - assisting Australian citizens and civic institutions to appreciate, understand, participate in, enjoy and celebrate the arts
- A strong and vibrant arts sector - providing infrastructure development for Australia's creative arts.

Overview of Not-For-Profit Arts and Culture Sector

Cultural organisations, which includes libraries, museums, performing arts organisations, and art galleries represent 1.9% of Australia's not-for-profit sector¹.

The Australia Council for the Arts has a detailed knowledge of the arts sector through its close relationships with arts organisations nationally. In 2010/11 we provided 1085 grants to arts and cultural organisations working across the fields of music, visual arts, literature and publishing, dance and theatre.

All of the organisations we fund are currently income tax exempt charities and are eligible for tax concessions across all jurisdictions. These organisations must also comply with state and territory charitable fundraising legislation. Some larger organisations have the added complexity of needing to comply with multiple laws because they operate in more than one jurisdiction. The Australia Council, in line with government policy, encourages arts organisations to engage in social enterprise and innovation, and seek income producing investments where appropriate.

¹ ¹ IBISWorld as reported in Business Review Weekly 23 June 2011

Recommendations

We make the following recommendations in implementing a new definition for charities:

- Ensure that any changes minimise the compliance burden for arts organisations
- Retain the dominant purpose test
- Adopt public benefit test in TR2011/04
- Adopt “advancement of the arts, culture and heritage” as a charitable purpose
- Adopt a flexible definition for “government control” that allows government owned entities to be charities that independently carry out their purpose
- Encourage the harmonisation of legislation to reduce complexity and the compliance burden of arts organisations operating across multiple jurisdictions.

Below, we expand upon these recommendations in our responses to a number of the questions posed in the Definition of Charity consultation paper.

CONSULTATION PAPER QUESTIONS

Dominant versus exclusively charitable purpose

Q1 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?

Our key concern with the change of definition to ‘exclusively charitable purpose’ is the potential for increasing the compliance burden for arts organisations who engage in business activities that are not, in themselves, charitable activities but nonetheless support the charitable purpose of their organisation. Many of these business activities of arts organisations are operating in non-arts areas such as running cafes and bars, or through retail and merchandising.

Broadly speaking, it has been government policy, from all tiers, to encourage arts organisations to diversify their business activities in order to generate more non-government sources of income. Therefore, it is imperative that arts organisations not be penalised for entrepreneurial activities that:

- Add to the health and sustainability of the arts and culture sector in Australia
- Are encouraged by government policy

Q2 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?

The Australia Council supports the consultation paper’s position that a peak body providing support services is a charitable institution.

Public benefit

Q3 Are any changes required to the Charities Bill 2003 to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

Q5 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?

Q6 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?

The Australia Council supports recommendations that the public benefit test should take into account the sparse population in some parts of Australia and that, while charities in these areas may represent smaller groups of people, they still demonstrably provide a public benefit. This recommendation would benefit arts organisations operating in remote areas of Australia.

The Australia Council endorses the view of Philanthropy Australia, who recommend against adoption of the 2003 definition of public benefit as this is unnecessarily complicated and restrictive. Greater flexibility would be offered by providing guidance on the meaning of public benefit such as that which is included in TR 2011/4 rather than the extensive and complicated guidance provided by England and Wales.

TR2011/04 clearly recognises that a benefit can be intangible. A purpose is for the public benefit if:

- it offers a benefit to the community that is real and of value, either tangible or intangible; and
- that benefit is available to the public.

Whereas the Charities Bill 2003 defines public benefit if:

- (a) it is aimed at achieving a universal or common good; and
- (b) it has practical utility ...;

While it is noted that in the explanatory memorandum that “practical utility” may include social, mental and spiritual benefits, there is a real risk that cultural activities – which provide a benefit to the community - may not be perceived as having “practical utility” in the sense that the activities may be intangible or ephemeral.

Presumption of public benefit

Q7 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?

We propose that the existing presumption of public benefit be maintained. We are concerned that arts organisations seeking charitable status may be required to demonstrate public benefit. This will introduce another layer of regulatory complexity, especially for smaller organisations. Currently, there is a presumption that the promotion of the arts by arts organisations is for the public benefit and the onus is on the Australian Taxation Office (or the ACNC after 1 July 2012) to rebut that presumption.

However, if the presumption of public benefit is removed in favour of all charities being required to demonstrate they are providing a public benefit, we urge that minimal compliance requirements and costs be put in place. This would assist in the government's objective to reduce an already heavy compliance burden for organisations.

Political advocacy

Q12 Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

Q13 Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

The Australia Council supports the recommendation to remove "attempting to change the law or government policy" as a disqualifying purpose. This provision was a major area of concern in our submission to the consultations on the Charities Bill 2003.

Government controlled entities

Q15 In the light of the Central Bayside decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?

The existing definition of 'government body' in the Charities Bill 2003 is not adequate and we support amending the definition in light of the Bayside decision. The Australia Council recommends that the definition of charity be established, which allows government owned entities to be charities in certain circumstances. The exclusion of all government bodies from being defined as charities causes confusion in the community and hampers an organisation's ability to receive funding from charitable foundations and create their public funds.

A number of arts organisations, including art galleries, museums, state theatre companies, state libraries and major performing arts centres are government owned entities (e.g. Sydney Opera House). Whilst governments may appoint directors, their governance structures operate at arm's length from government and operate in exactly

the same economic environment and have the same challenges as other non-government arts organisations.

The Bayside decision addresses the concerns expressed in Australia Council's 2003 submission by affirming that as long as the institution independently carries out its purpose, it can still be charitable. Furthermore, government funding of an institution does not mean the institution cannot be charitable. If the sole purpose of the institution is charitable, the fact that it is substantially funded by government will not affect its characterisation as a charitable institution.

Charitable purposes

Q16 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?

Q17 If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

The Australia Council supports a distinct charitable purpose for the advancement of the arts, culture and heritage for the reasons outlined in Charities Bill 2003 explanatory memorandum (EM). As stated in this EM, the advancement of culture includes, without limitation:

- the promotion of and participation in the arts, including literature, music, the performing arts and visual arts (including the various art forms currently recognised on the Register of Cultural Organisations under Subdivision 30-F of the *Income Tax Assessment Act 1997*);
- the establishment and maintenance of public museums, libraries and art galleries, and moveable cultural heritage;
- the promotion of Australian Indigenous culture and customs;
- the promotion of the culture and customs of various language and ethnic groups; and
- the protection and preservation of national monuments, areas of national interest and national heritage sites and buildings.

However, the Australia Council recommends changing “the advancement of culture” in 2003 Bill to “the advancement of the arts, culture, or heritage” as it occurs in England, Wales, Scotland and Ireland. Whilst the 2003 EM on the advancement of culture encompasses the areas of arts and heritage, this expanded definition provides greater clarity and is more reflective of the usage and understanding of these words in the arts, cultural and heritage sectors.

The Australia Council also supports the recommendation from the Community Foundations and Philanthropy Australia to include additional charitable purposes:

- Advancement of community capacity building
- Advancement of community development

The Australia Council supports many community-based organisations that focus on community capacity building and community development using artistic outcomes to achieve these purposes.

State and Territory issues

Q18 What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

The Australia Council supports the harmonisation of legislation and definitions as a means to reduce the complexity and compliance burden of arts organisations who frequently operate across multiple jurisdictions.

We also support harmonising charitable fundraising legislation to enable charitable trusts in all jurisdictions to be recognised as charitable as highlighted paragraph 144 of the consultation paper. Such changes would assist those arts organisations that are government entities such as art galleries, performing arts centres and museums