



TREASURY CONSULTATION PAPER
'A DEFINITION OF CHARITY'
JOINT COSS SUBMISSION

December 2011

CONTACT

Australian Council of Social Service

Locked Bag 4777, Strawberry Hills, NSW, 2012

T (02) 9310 6200 E info@acoss.org.au

www.acoss.org.au

First published in 2011 by the
Australian Council of Social Service

Locked Bag 4777
Strawberry Hills, NSW, 2012 Australia
Email: info@acoss.org.au
Website: www.acoss.org.au

ISSN: 1326 7124
ISBN: 978-0-85871-017-7

© Australian Council of Social Service

This publication is copyright. Apart from fair dealing for the purpose of private study, research, criticism, or review, as permitted under the Copyright Act, no part may be reproduced by any process without written permission. Enquiries should be addressed to the Publications Officer, Australian Council of Social Service. Copies are available from the address above.

JOINT COSS SUBMISSION TO THE DEFINITION OF CHARITY CONSULTATION

This submission is made on behalf of the national COSS network

Australian Council of Social Service (ACOSS)
ACT Council of Social Service (ACTCOSS)
Council of Social Service of NSW (NCOSS)
Northern Territory Council of Social Service (NTCOSS)
Queensland Council of Social Service (QCOSS)
South Australian Council of Social Service (SACOSS)
Tasmanian Council of Social Service (TASCOSS)
Victorian Council of Social Service (VCOSS)
Western Australian Council of Social Service (WACOSS)

About the Councils of Social Service (COSSes)

The COSSes are the peak bodies representing the needs and interests of service providers and their clients in the non-profit social service sector in Australia. We have over 3000 member across Australia, comprising community service providers, professional associations and advocacy organisations.

We provide:

- Independent and informed policy development, advice, advocacy and representation about issues facing the community services sector;
- A voice for all Australians affected by poverty and inequality; and,
- A key coordinating and leadership role for non-profit social services across the country.

We work with our members, clients and service users, the non-profit sector, government, departments and other relevant agencies on current, emerging and ongoing social, systemic and operational issues.

This submission is based on the COSS network's analysis of the Treasury Consultation Paper 'A Definition of Charity'.

Introduction

The COSS network has a keen interest in not-for-profit regulatory reform.

There has been a raft of recent reforms and inquiries into the not-for-profit sector; the introduction of initiatives such as the development of the Australian Charities and Not-for-Profit Commission (ACNC); the current consultations regarding the 'in Australia' requirements; and, the Aid/Watch Tax Ruling TR 2011/T4. All of these provide a strong catalyst for the introduction of a statutory definition of charity. However it is crucial that the definition does not reverse or contradict the raft of other reforms underway.

The COSS network strongly endorsed the 2001 Charities Definition Inquiry recommendations as they were developed in full and detailed consultation with the sector and attracted widespread support. Following the 2001 Inquiry there has long been strong support for a modernised definition of charity. However there is a concern that the current proposal strays from the original recommendations of the 2001 Inquiry. This stems from two key concerns.

The first is that the case law has moved considerably in recent years, most notably with the decision on *Aid/Watch* (2010) which went much further than other processes to date in setting out the extent to which advocacy is an acceptable part of charitable purpose. As the capacity for advocacy is a key tenet of the sector's support for a modernised definition of charity, some suggest it may be sufficient to ensure that those administering charitable status act in accordance with the (contemporary) common law.

The second concern relates to an apparent departure in the current policy development towards the statutory definition, from the central role that the 2001 Charities Definition Inquiry played in setting out the terms of a statutory definition. If the 2001 Inquiry's notion of 'benevolent charity' were adopted, it would result in a broader accessibility to status as a public benevolent institution, extending gift deductibility to organisations assisting disadvantaged people whether or not by direct services. This approach has widespread support among our networks and was also the subject of the Productivity Commission's 2010 recommendations on this issue. Yet the current policy development seems to be focused more on the recommendations of the 2008 Senate Economics Committee Inquiry into Disclosure Regimes for Charities and NFP Organisations and the 2010 Senate Economic Legislation Committee Inquiry into the Tax Laws Amendment (Public Benefit Test) Bill 2010. Consequently there are some new complexities to the proposed reforms, particularly on the issue of public benefit, and some renewed uncertainty about the extent to which the reform will satisfy the recommendations of the 2001 Inquiry.

The COSS network would like to see the adoption of the 2001 Inquiry recommendations as part of this process. Our support for the statutory definition of charity rests strongly on the principles established by that Inquiry and we reaffirm its centrality to the current reform.

The most important recommendation from the 2001 Inquiry was not the statutory definition of charity itself; it was the proposed reform of Public Benevolent Institution (PBI) status as that subset of charities whose main purpose was to assist the most disadvantaged in the community, regardless of whether this was via direct service provision. From a taxation standpoint, PBI status is much more important than charitable status alone, as it includes gift deductibility. Ironically, although this was first established with 'traditional charities' in mind, the scope of gift deductibility in the community and social services sector has lagged behind developments elsewhere, such as environmental organisations. The COSS network hopes that this will be further explored by Treasury to ensure the full implementation of the 2001 Inquiry recommendations, as supported by the 2010 Productivity Commission Inquiry into the Contribution of the Not-for-profit Sector.

The COSS network would have liked to have seen more time for this consultation process to occur, particularly given the raft of inquiries concerning the not-for-profit sector currently being undertaken and the parallel development of the ACNC. From a sector perspective it

would have been helpful for greater linkages across the multiplicity of processes. We have received a strong message from our networks about the confusion at the range of reforms underway and an inability to contribute in the manner organisations would like to, because there is so much reform underway on so many fronts.

The COSS network would also like to add support to the submissions of PILCHConnect, the Not-for-Profit Project - University of Melbourne Law School, and Changemakers Australia.

Please find below our responses to the consultation questions.

Consultation Questions

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 COSS network does not have any specific issues regarding the core definition contained in the Charities Bill 2003.

Case law and the recent Tax Ruling TR 2011/T4 have provided greater clarity around charitable status. However, we do believe that there needs to be an element of flexibility in relation to dominant purpose, as opposed to blanket prohibition. It would make more sense to clearly define ‘dominant purpose’ where ‘public benefit’ is emphasised as per the *Charities Bill 2003 Explanatory Material sec 1.28 - 1.32* (p7-8)

“1.28 For the dominant purpose of an entity to be charitable, the entity must have a purpose or purposes that are charitable.

1.29 Similarly, for the dominant purpose of an entity to be for the public benefit, the entity must have a purpose or purposes that are for the public benefit.

1.30 Further, for the purpose or purposes of an entity to be dominant, any other purposes of the entity must further or be in aid of, and be ancillary or incidental to the dominant purpose.

1.31 It may be that multiple charitable purposes for the public benefit, when taken together, for a dominant charitable purpose for the public benefit. Therefore, it is not necessary for an entity to show that a single purpose is their dominant purpose.

1.32 In determining the dominant purpose of an entity, items that may be considered include, but are not limited to:

- The constituent documents of the entity, if the entity has such documents; and*
- The activities of the entity.”*

Defining 'dominant purpose' also relates to the current work being undertaken by Treasury through the 'in Australia' requirements and the *Better Targeting of Concessions* (unrelated business income) proposal. From a sector perspective, this reform work is interrelated and cannot be viewed in isolation. For example, many COSS network members are uncertain about how their activities would be viewed under the unrelated business income proposals and its intersection with 'dominant purpose definitions'.

An example of this uncertainty can be seen in, for example, social enterprises. Another example could be an organisation where the dominant purpose is providing care for the homeless. In addition it holds sporting activities for its clients and runs an op shop. Both, if viewed in isolation, would not be seen as a 'charitable purpose', however, when viewed as a whole they are ancillary activities to the organisations core purpose.

In Recommendation 3 of the 2001 *Report on the inquiry into the definition of charities and related organisations* states:

- i. *"If the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes."*

The COSS network believes that more clarity is required on the related/unrelated definition and that the above recommendation from the 2001 Inquiry be incorporated into the definition. It is vital that any non-charitable work, that is in aid of or ancillary to the dominant purpose of the organisation, not be prohibited under the standard definition. This is also supported by the definition of sole purpose contained in TR 2011/4.

Given this, we prefer the formulations above around "dominant purpose" to the notion of an "exclusively charitable purpose" which is both inflexible and narrower than required, or is misleading in its ordinary meaning.

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?*

The COSS network would like to see the proposed statutory definition provide clarity in relation to the status of peak bodies. In the discussion paper there is still a lack of a clear definition regarding what constitutes a peak body.

The definition presented by the NSW Administrative Decisions Tribunal in 2003 still requires further clarification, as peak bodies, industry bodies and professional associations would all fall under the definition presented in the discussion paper. We believe that this is not the intention of 'peak body' provisions and that further work must be undertaken to ensure that an adequate definition of what constitutes a peak body is developed. The definition of a peak body must be developed in consultation with the sector, in particular, peak bodies.

The COSS network support the position of the Melbourne University Not-for-Profit Project submission, which draws on the legislation in the UK, Scotland and Northern Ireland, that ‘the purposes of peak bodies and also infrastructure organisations should be expressly recognised as a charitable purpose, namely in its promotion of volunteering, the voluntary sector or the effectiveness or efficiency of charities’.

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

The statutory definition needs to provide clarity in relation to the meaning of ‘public’, particularly given the complexity of common law in this area.

The argument outlined in Secs 63-64 of the Consultation Paper would appear appropriate and supports the need for greater clarification of ‘sufficient section of the general community’ in relation to what the ATO defines as ‘numerically negligible’, particularly taking into account organisations working in geographically isolated areas or with people with rare diseases, etc.

The issue of including a ‘detriment or harm’ clause in this section needs to be clarified. Some organisations are involved in activities which other sections of the community would consider could cause ‘detriment or harm’. While this test is presumably intended to be applied to the immediate activities of a charity (for example a cult intentionally harming members), legitimate charitable activity remains vulnerable under an open-ended definition in this respect.

The COSS network assumes that a judgement call regarding the balance of activities would be made by the ACNC, but there is a level of concern regarding what criteria will be used to make the determination. The balance of harm and benefit is inherently political and if it is to be included in the Act it would need to be defined in such a manner to avoid politicising potentially controversial activities such as safe sex education, needle exchanges, and so on. If the criteria are not adequately determined in the ruling then the detriment or harm provision may need to be removed as it may become too political a decision.

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?*

The COSS network supports the proposal in the Consultation Paper that refers to the New Zealand definition. This provides an example of how the definition can be modified taking into account native title holders and traditional owners who are highly likely to have familial ties. This definition meets both the ‘charitable purpose’ and the public benefit test requirements.

In relation to this question we would like to refer to the response contained in the Melbourne University submission.

5. *Could the term 'for the public benefit' be further clarified, for example, by including additional principle outline in ruling TR 2011/D2¹ or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?*

The term 'for the public benefit' could be further clarified by including the concept that *'the dominant purpose of a charitable entity must be altruistic'* as per Recommendation 7 of 2001 Charities Definition Inquiry.

In addition, the inclusion of the principles outlined in TR 2011/4 would provide greater clarity as it does provide guidance on the meaning of what is beneficial to the community. However, we refer to and repeat our comments above in relation to the incorporation of a test of detriment or harm.

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?*

While this approach does provide considerable flexibility and as such has the capacity to take into account future changes within the sector and society in general, it is not equitable.

For an organisation to challenge the meaning of 'public benefit' in the courts they need considerable financial resources, alternatively they need to be able to access pro bono legal assistance. Small to medium NFPs are highly unlikely to have the former and may not even be aware that the latter is a possibility. For reasons of equity, *'for the public benefit'* needs to be clarified in the definition, drawing on common law principles and TR 2011/4.

Our sector could be particularly vulnerable to different perspectives on legitimate charitable purpose if there is not a firm position in statute.

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?*

As a COSS network this has been the question that has raised the most discussion amongst our membership and networks, with a diversity of opinion.

On the one hand, if the public benefit test is as outlined in Sec 82, the test is reasonable and not burdensome and will not disadvantage those that currently come under the forth head of charity. However, if the test was expanded to all four heads of charity there is a risk of increasing compliance costs and red tape. In this context we note the submission of Moores Legal which outlines the experience overseas and the practical problems with removing the presumption of benefit. The removal would be detrimental to the commitment of governments at all jurisdictions to reduce the regulatory burden on the not-for-profit sector. Another option is that if the presumption of public benefit

is retained, then the ACNC will have the power to disprove public benefit and remove charitable status. When presumption of public benefit has been removed in other jurisdictions, such as the UK, it hasn't solved many problems. When it has been tested there has often been a low threshold for determining charitable status. In addition, presumption of public benefit can be easily rebutted and if there are concerns, the regulator can always look into it regardless. It is also important to note that the removal of the presumption of public was not recommended by the 2001 Charities Definition Inquiry.

The COSS network believe that the preferred way forward is to maintain the presumption of public benefit until the ACNC is established and operational and then have the new entity explore the potential of removing the presumption of public benefit if necessary. If this is to be the role of the ACNC then this will, as PilchConnect's submission highlights, require adequate funding and powers.

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

This question appears to assume a reversal of the presumption of public benefit, which is not fully supported, as per our comments in the previous question. There is a further concern with this question in that the framework for and functions of the ACNC are still under development. Therefore we would not want to pre-empt any response or position that the COSS network may have in relation to the scope and role of the ACNC.

The COSS network does however support the position of Melbourne University that 'the ACNC should be required to provide further guidance on the test of public benefit'. The COSS network believes that the ACNC will be crucial in addressing inconsistencies and overly onerous regulatory processes across the sector. Central to its role will be the education and support functions to the sector. A carrot and stick approach to regulation will not be successful, particularly given the complexity of the sector and the associated compliance requirements.

The establishment of the ACNC will provide the framework for other important reforms to ensure a national approach to things like accounting standards and fundraising. However, it is vital that the sector is involved in the work of the ACNC at every juncture.

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

Please refer to our response to question 7. However, should the presumption of benefit be overturned presumably they would need to demonstrate 'benefit' under the new requirements. This is a reasonable expectation should the presumption be removed.

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

The COSS network support the view of Melbourne University's submission that an activities test should not be included in the definition as it confuses the concepts of

charity law and it is not undertaken in comparable legislation in other jurisdictions. The principles are well set out in TR 2011/4. The discussion of charitable status should be about purposes not activities as government, courts or regulators should not generally be assessing the merits of how charities pursue their purpose.

In this framework, charities should be able to do all legal things in furtherance of their charitable purposes. This framework makes any activities test redundant except in circumstances where there is a concern about activities that reveal a non-charitable purpose – in which case, as the Melbourne University submission points out the current law already enables activities to be taken into account. Accordingly, there is no need to complicate a statutory definition by reference to activities, but if such an activities test is to be introduced it must adequately reflect the principles in common law.

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

Please see our response to question 10.

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?

The High Court's *Aid/Watch* decision has identified and protected the right of charitable organisations to be involved in advocacy as an integral part of their charitable purpose. However the COSS network is concerned that the principles of the *Aid/Watch* decision are not adequately reflected in the suggested changes and would like to see this revisited to ensure that the principles of TR 2011/4 are adequately captured.

The COSS network would also like to highlight that there could be cases where there may be considerable difficulty in separating policy and law reform work from a political cause/activity. Obvious examples include the relationship between environment issues and the Green's political platform, the work of those providing support and advocacy around problem gambling and various "no-pokies" MPs, and disability advocates supporting people with disabilities running for parliament.

It is feasible that an organisation advocating for policy or law reform around a particular issue could be perceived as supporting a specific political candidate, party or cause. There may be situations where a cause or issue is taken up by a political party as a result of an organisation's advocacy – in this situation would the organisation be required to stop advocating around this issue?

Again, the focus of a definition of charity should be on the purpose of an organisation, not the activities undertaken in furtherance of that purpose. Thus, while a political purpose may not be charitable, a charity should be able to engage in 'political' analysis and discussion. Our understanding is that the current tax law recognises this and we are concerned that the Consultation Paper is a step backward and could potential constrain advocacy.

The COSS network would particularly like to express our support for the submissions of PilchConnect, Melbourne University and Changemakers Australia in relation to both question 12 and question 13.

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

This is a complex question, particularly for peak bodies and other organisations engaging in advocacy on behalf of marginalised groups in our community. These organisations have a critical role in the generation of public debate and the development of policy, particularly in the lead up to elections. In many instances charities are the only people speaking alongside those who are experiencing disadvantage or those who have a limited public presence. The definition must not limit this role. The COSS network believes that our members have a right to participate in advocacy, as long as it is pursuant with their charitable purpose.

Charities, given that they have already established their charitable purpose, should be allowed to engage in legal activities pursuant to their charitable purpose. It is important that charities are able to discuss issues and engage in policy debate and reform. For example, putting out a policy scorecard in the lead up to an election to inform the general public is a key part of COSS network advocacy and analysis.

There is a possibility that the prohibition against supporting political parties or candidates could constrain advocacy through a fear of the politicisation, perceived or otherwise, of an organisation's position if political party adopts them. This undermines the purpose of charity advocacy. This is why it is vital that the core focus of the definition be on an organisation's purpose/s, rather than their activities.

Illegal Activity

The other activity which would disqualify an NGO from being a charity is illegal activity. However, some of the wording in the Consultation Paper is significantly broadened from the 2003 Charity Bill definition (s4[e]) which was about not engaging in a serious offence. The Consultation Paper picks up the Charities Bill wording at paragraph 115, but then at paragraph 116 refers to "supporting illegal activities" as a disqualifying activity. While a regulatory regime to penalise rather than deregister is welcome, the two formulations are very different and might have consequences for advocacy.

It is not clear what "supporting illegal activities" might be – particularly given that the law of protest in Australia is completely unclear and there are few or no clear civil rights. If a group organised a protest involving some minor illegality (for example, banner drops, blocking footpath/traffic) and a charitable organisation made a statement in support of the protester's cause – would this be "supporting" that activity?

Our sector would have particular concerns around the "supporting illegal activities" formulation in relation to public health issues. For instance, would safe sex advice for those in the sex industry be seen as supporting illegal activities, or needle exchanges or even detox facilities be seen as supporting drug use? Even if this was not the intent of

the Act, the fear of crossing a very vague line of “support” may shut down or deter some charitable activities. Much better to have a clearer line that says simply that charities shall not engage in unlawful conduct as per the 2003 Bill.

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

The COSS network believes that the ACNC will be able to provide further clarification to entities, and may also have a level of discretion in making decisions regarding more complex entities.

15. *In the light of the Central Bayside decision is the existing definition of ‘government body’ in the Charities Bill 2003 adequate?*

It is important that *Sec 3 (1) (b) Charities Bill 2003* be amended to clearly reflect the High Court’s *Central Bayside* ruling. The definition as it currently stands ie *‘a body controlled by the Commonwealth, a State or a Territory;* does not reflect the High Court’s ruling on a *‘government body’*.

16. *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?*

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

The COSS network would encourage Treasury to look to other jurisdictions definitions to see how they capture charitable purposes. While the list provided, at a surface level, covers the field of the sector, it is vital that all activities engaged in for charitable purposes are actually covered in the list. It is essential that there be clear explanatory materials as to what the heading ‘any other purpose that is beneficial to the community’ includes. Areas such as community development and increasing social and economic participation are not adequately determined.

The COSS network also supports the submission of the Community Housing Federation of Australia that the provision of not-for-profit community housing be regarded as a charitable purpose. England, Wales, Scotland and North Ireland recognise housing as a designated charitable purpose and we recommend that this become the case of not for profit housing providers under the new revised definition of charity.

The COSS network would like to reinforce the call of Changemakers Australia to including the word ‘prevention’ in addition to ‘advancement’ under charitable purposes where relevant. The understanding/definition of the term ‘advancement’ needs to take into account the role/term of ‘prevention’, e.g. ‘advancement of health which includes preventative and curative purposes. This reflects the significant shifts in research and public policy towards prevention as having greater positive effect and providing a more affordable and sustainable objective than reacting to problems once they exist. There are numerous community welfare organisations where prevention is a primary object

(for example through providing prevention education in relation to domestic violence, several early intervention services etc).

The definition of advancement should also be amended to reflect the High Court's *Aid/Watch* decision.

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

The COSS network supports the development of a harmonised definition of charity across jurisdictions. This will considerably reduce the regulatory burden that many of our member organisations currently face, particularly when they are operating in multiple jurisdictions.

There are likely to be considerable changes required across jurisdictions to achieve a harmonised definition. A comprehensive mapping across all relevant laws/jurisdictions should be undertaken to examine the points of difference and provide recommendations moving forward.

Any harmonisation process also needs to be undertaken within a clear timeframe, with adequate consultation.

19. *What are the current problems and limitations with ADRFs?*

The COSS network does not have any comments regarding ADRFs.

20. *Are there any other transitional issues with enacting a statutory definition of charity?*

There will be issues resulting not only from the transition to enacting a statutory definition of charity (however this could be limited if it is closely aligned with case law) but also from the administrative transfer of powers from the Australian Tax Office to the ACNC. The COSS network will make a submission to the upcoming ACNC consultation that will encompass these transitional concerns, particularly given the limited information regarding the transition to the ACNC that is currently available.

It is assumed that while the ACNC will have a role in educating and supporting the sector, it is also important to recognise the central role of peak bodies, such as the COSS network and our members, in sector education, support and guidance. This role cannot be and should not be undertaken by a regulator. It is vital that Government resources and supports peak bodies to continue to undertake this function.

In the transition it is important to recognise that Incorporated Associations are a significant part of the NGO sector. They are managed by voluntary boards, many of whom would have limited experience or knowledge of the implications of a statutory definition of charity. When the Bill is enacted, there will need to be an extensive education program based on plain English resources outlining the changes to the Act and their implications for both current and potential charities. This is why the role of both the ACNC and peak bodies cannot be underestimated.