



**SUBMISSION**  
**AUSTRALIAN RED CROSS SOCIETY**

**IN RELATION TO**  
**THE CONSULTATION PAPER “A DEFINITION OF**  
**CHARITY”**

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<b>Submission by</b>	Australian Red Cross Society
<b>Date</b>	20 December 2011
<b>Submission to</b>	Manager Philanthropy and Exemptions Unit The Treasury Langton Crescent <b>PARKES ACT 2600</b>



## INTRODUCTION

The Australian Red Cross Society (“Red Cross”) has responded to a number of the consultation questions presented in the Consultation Paper.

Those responses are:

- set out in summary form in the Executive Summary (pages 3 -6 below); and
- set out in more detail in the Submissions (pages 7 – 34 below).

The Submissions are made in the context of:

- noting its general activities,
- noting some relevant characteristics of Red Cross; and
- observing that the interconnectedness of the various different issues being considered in the reform process in relation to the establishment and regulation of the not-for-profit sector need to be kept clearly in mind, when considering any particular element of the subjects of reform proposals.

## EXECUTIVE SUMMARY

*Consultation 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?*

Red Cross considers that, viewed overall, the broad scope of the 2003 Exposure Draft Charities Bill draft provisions are appropriate and workable, including in particular its definition of ‘charity’.

In subsequent sections, Red Cross makes some suggestions in relation to specific elements of the inter-related definitions in the 2003 draft.

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

Red Cross considers that there is no objective criterion for determining when the condition of ‘numerically negligible’ is satisfied and recommends consideration of a multi-factor test, one element of which is that beneficiaries of a charity cannot be a group of persons who are distinguished by their relationship to a particular individual or individuals.

This approach could help ensure that charitable assistance to vulnerable persons is not excluded by a solely numerical test.



*Consultation 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?*

*Consultation 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?*

Red Cross considered these questions together and submits that a broad definition of 'public benefit' of the kind proposed in the Charities Bill 2003 may be adopted, subject to the 'numerically negligible' criterion for exclusion from public benefit being appropriately varied as noted above.

Red Cross submits that it is preferable to leave the further development of the meaning of 'the public benefit' to the provision of guidance material by the Australian Charities and Not-for-profits Commission ("ACNC") and any court decisions. This method gives a reasonably high degree of certainty to charitable entities whilst allowing flexibility for evolving needs over time, as well as ready access at low cost to reliable information.

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

Red Cross submits that the need to place reasonable limits on the non-charitable purposes (if there are some purposes which are in fact able to be so characterised of a charitable entity) is sufficiently satisfied by requiring non-charitable purposes 'to be in aid of or further the charitable purpose'.

Red Cross recommends that consideration be given to removing the second element in the definition of 'dominant purpose' (that is, that the other purposes must be "ancillary or incidental" to the charitable purposes).

*Consultation 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?*

Red Cross submits that the definition of 'charity' should provide for and allow activities which are intended to change the law or government policy, if these activities are in aid of or further related to an entity's dominant purposes which are charitable. The definition of 'disqualifying purpose' should be revised accordingly.

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

The purpose of supporting or opposing a political party or a candidate for political office should remain a disqualifying purpose.



Red Cross submits that, in relation to a candidate for political office, the insertion of the phrase 'or opposing;' immediately following the word 'supporting' is appropriate.

However, advocating a political cause should not be a disqualifying purpose but rather be subjected to a charitable purpose test. The purpose of advocating a political party or cause should be amended by removing the word 'cause' from the disqualifying purposes.

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

Red Cross submits that there is no need for any specific restrictions upon the types of entities which can be a 'charity' in addition to those specified (which include individuals, partnerships, political parties, superannuation funds and government bodies).

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

For the avoidance of any doubt, Red Cross submits that:

- specific provision should be included to confirm that the conduct of any activities by Red Cross in its capacity as an auxiliary to the public authorities in the humanitarian field does not bring Red Cross within the definition of 'government body' for the purposes of the definition of 'charity';
- it would be desirable to ensure that the definition of government body excludes an entity which is a charitable entity but which undertakes provision of services to the community under a contract or agreement for the provision of services between the charitable entity and the Commonwealth, a State or a Territory, provided that the contract or agreement does not include any provision for any control or directions by the government of the activities of the entity, other than in connection with the due provision of the specific services provided under the contract.

Furthermore, the application of the definition of 'government body' could be one of the subjects upon which the ACNC could provide guidance under specific provisions of the legislation.

*Consultation question 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?*

The definition of 'Advancement' should be amended to include 'enhancement'. Enhancement is a lesser degree of improvement and should be recognised as a method of advancement.

Subject to that amendment, Red Cross considers that the list of charitable purposes in the Charities Bill 2003 is appropriate.



Consultation question 18: What are the current problems and limitations with ADRFs?

Reform of the law is required to provide a contemporary legal framework to enable flexible and appropriate disaster relief to be provided to people and communities affected by disasters, from funds donated for these purposes.

Red Cross submits that the present limitations on the nature and scope of activities which are undertaken to assist the recovery of individuals and communities after a disaster should be reviewed and revised particularly:

- to enable far more flexibility in meeting the longer-term needs of individuals and communities; and
- by removing the current requirement that individual persons who are affected by the disaster to be in distress.

Red Cross recommends consideration of:

- the creation of a simple mechanism to provide a basis for collection of funds in advance of a disaster occurring; and
- a legislative provision to enable any surplus from the appeal funds provided for relief of particular disaster to be held for the benefit of persons affected by like disasters in the future, as provided for by the published appeal intent.

The basis for the suggestions set out above is provided in more detail in the following sections of the Submission.



## SUBMISSIONS

### About the Australian Red Cross Society

The body which became the Australian Red Cross Society was formed as a branch of the British Red Cross Society at Government House, Melbourne on 13th August 1914 by Lady Helen Munro-Ferguson, wife of the Governor-General.

In 1938 Red Cross was formally recognised as an autonomous National Society, and was incorporated by Royal Charter in 1941. Its official name then became the Australian Red Cross Society.

Red Cross is a member of the world-wide International Federation of Red Cross and Red Crescent Societies ('the Federation').

Today, Red Cross' mission is to be a leading humanitarian organisation in Australia, improving the lives of vulnerable people through a variety of community services and promotion of humanitarian laws and values.

### *Characteristics unique to Red Cross*

Red Cross also has some characteristics which are unique to it in Australia under international law and the law of Australia. These characteristics, noted briefly below, may have some consequences for the drafting of the definition of 'charity' in relation to which more detailed submissions are made below.

Amongst other matters, the Royal Charter of Red Cross requires<sup>1</sup> that --

The Society shall at all times act in conformity with the Geneva Conventions and their Additional Protocols, the laws of Australia and the Fundamental Principles.

The Society shall carry out the functions set out in the Charter, the functions required of the Society by international treaties relating to international humanitarian law to which Australia is a party and the resolutions of the International Conference of the Red Cross and Red Crescent.

Amongst other matters, the Royal Charter also recognises<sup>2</sup> that –

The Society is a voluntary aid society, auxiliary to the public authorities in the humanitarian field, including during times of emergency and times of armed conflict in accordance with the Geneva Conventions and their Additional Protocols.

<sup>1</sup> Charter, Clause 2, as amended to date (Fourth Supplemental Charter, made by the Governor-General on 12 October 2010).

<sup>2</sup> Charter, Clause 2



The public authorities shall at all times respect the adherence by the Society to the Fundamental Principles.

Beyond these specific functions relevant to its status as an auxiliary to the public authorities, which operate in times of armed conflict and in times of civil emergency (such as emergency and disaster relief in times of bushfires, floods, cyclones, etc), Red Cross currently provides a large range of community services, ranging from programmes for drug and alcohol education, refugee support and tracing services, family nutrition education, outreach to elderly and socially isolated people to programmes addressing Indigenous disadvantage.

In addition, as a major component of its activities throughout Australia, Red Cross also operates the Australian Red Cross Blood Service which supplies blood products and services to the Australian community<sup>3</sup>.

### ***General activities of Red Cross***

The breadth and organisational capacity of Red Cross allows us to work with a wide range of communities to affect meaningful and sustainable positive changes.

Following a major organisational review of its non-Blood Service activities, Red Cross is implementing a new Strategic Direction for those activities which aims to focus its services to benefit the most vulnerable in the most vulnerable communities.

In order to streamline and maximise the outcomes of our services, Red Cross has identified the following areas as its core priorities for action which include:

- ***Emergency services*** - In Australia and internationally, Red Cross helps individuals and communities to prepare for, respond to and recover from emergencies, including both immediate and longer term assistance.
- ***International aid and development*** - Red Cross support for international aid and development continues to grow, including responding to emergencies, capacity building for National Societies (also members of the Federation) and key programs tackling significant health and development issues such as HIV, water and sanitation and disaster preparedness.
- ***Impact of migration*** - Red Cross responds to the expanded focus on migration, through programs that assist refugees, asylum seekers, immigration detainees and other people vulnerable as a result of migration. This includes a core commitment to restoring family links in Australia and internationally.
- ***Work with Indigenous communities*** - Indigenous communities rank as the most disadvantaged on a number of socio-demographic indicators, and our work in these communities is a key part of Red Cross activities.
- ***Addressing disadvantage*** - Red Cross is committed to working with the most disadvantaged people in the most disadvantaged communities through a place-based

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<sup>3</sup> Blood products and services are provided, , under the terms of a Deed of Agreement with the Commonwealth of Australia through the National Blood Authority, with the generous support of very large numbers of blood donors





approach. Red Cross helps individuals, families and communities to build on their strengths and further develop the necessary skills and attributes that will their quality of life.

- ***Providing bridges back into the community for marginalised people*** - Red Cross seeks to help connect isolated and marginalised people back into their communities, including people with mental illness, ex-prisoners, homeless people, isolated older people living alone and other highly marginalised people.
- ***International Humanitarian Law*** - Red Cross champions International Humanitarian Law in Australia and internationally as a core mandate of the Red Cross Movement as enshrined in the Geneva Conventions.

The Rules of Red Cross (made under the Royal Charter) provide amongst other matters that Red Cross may only pursue charitable purposes associated with its objects.<sup>4</sup>

### **Preliminary observations – interconnectedness of the reform process**

An academic commentator has noted that:

‘the term "charitable" is not necessarily the basis for determining access to tax concessions, so that even being able to determine whether an entity is charitable does not answer the more immediate question of whether the entity is entitled to a particular tax concession. In the case of each concession. It is necessary to consider the eligibility criteria because, even if an entity qualifies as a charity at common law, this does not ensure it has access to a particular concession’<sup>5</sup>

This submission deals with some of the consultation questions raised in the consultation paper concerning the definition of charity. Nonetheless, as prompted by this quotation, it is still essential to keep in mind that not all questions of significance relating to the definition will necessarily resolved by the definition.

Red Cross acknowledges that a number of these other issues are being dealt with in other consultation processes.

However it will be very important that, in determining outcomes on any particular issue, the interrelationships of the various elements of the reform process are clearly kept in mind and considered – so as to avoid potential inconsistency and unintended consequences.

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<sup>4</sup> Rule 2.2

<sup>5</sup> Ann O’Connell, ‘The tax position of charities in Australia – Why does it have to be so complicated?’ (2008) 37 *Australian Tax Review* 17 at p 20



### Consultation 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?**

#### ***Introduction***

A charitable entity or object, as defined by law, benefits from various privileges unavailable to a non-charitable entity or object; as a consequence it is clearly necessary for the law to distinguish a ‘charity’, (and ‘charitable purposes’), from other entities and purposes<sup>6</sup>. In traditional common law analysis, the entity or object was required to be ‘exclusively charitable’.

However, following the Enquiry into the Definition of Charity, the Exposure Draft ***Charities Bill*** 2003 proposed the removal of the traditional exclusivity requirement. Rather it proposed the substitution of some positive requirements and some prohibitions, based on utilisation of reference to the dominant purposes of the charity. The various key elements referred to in the definition are themselves defined in some detail.

#### ***Elements of the proposed definition***

The proposed definition:

- imposes a number of positive requirements for an entity to be a ‘charity’; and
- provides a number of prohibitions,

so that if an entity satisfies the positive obligations nonetheless it cannot be a ‘charity’ if it has certain other characteristics or does certain other things.

#### **‘Charity’ - Positive requirements**

The Exposure Draft proposed a definition of an entity as a ‘charity’, which sets out requirements that, to be a charity, the entity must be:

- not-for-profit<sup>7</sup>; and
- have dominant purposes<sup>8</sup>; and

<sup>6</sup> G E Dal Pont, *Law of Charity* (2010) suggests that ‘because ‘charity’, as defined by law, benefits from various privileges unavailable to non-charitable objects, the law must distinguish the charitable from the non-charitable’

<sup>7</sup> Defined as follows: ***5 Not-for-profit entities***

An entity is a ***not-for-profit entity*** if:

- (a) it does not, either while it is operating or upon winding up, carry on its activities for the purposes of profit or gain to particular persons, including its owners or members; and
- (b) it does not distribute its profits or assets to particular persons, including its owners or members, either while it is operating or upon winding up.

<sup>8</sup> As defined in clause 6 of the Bill



- those dominant purposes must be charitable<sup>9</sup>; and
- those dominant purposes must (generally) be for the public benefit<sup>10</sup>.

### **'Charity' - Prohibitions**

If those conditions are satisfied, the entity has established its 'prima facie' status as a 'charity', but the definition then requires also that the entity must not:

- undertake activities that "do not further, or are not in aid of, its dominant purpose" or, in other words, which are not directed towards achieving its dominant purposes;
- have a 'disqualifying purpose'<sup>11</sup>;
- engage in a serious offence<sup>12</sup>;
- be an individual, a partnership, a political party, a superannuation fund or a government body<sup>13</sup>.

### **'Dominant purpose'**

The 'purposes' of the entity must include charitable purposes and any non-charitable purposes must be purposes which are in aid of, or are ancillary or incidental to, the charitable purposes.

### **'For the public benefit'**

In a similar way, the dominant purpose (or purposes) of an entity is (or are) for the public benefit if:

- one or more purposes are for the public benefit; **and**
- any other purposes that it has are purposes that further or are in aid of, and are ancillary or incidental to, its purposes that are for the public benefit.

### **'Disqualifying purposes'**

The provision states that the purpose of engaging in certain activities that are 'unlawful' is a disqualifying purpose.

In addition, under clause 8 (2) certain other purposes including:

- 'advocating a 'political party or cause'; or
- supporting a candidate for political office; or
- attempting to change the law or government policy

<sup>9</sup> As defined in clause 10 of the Bill.

<sup>10</sup> As defined in 7 of the Bill

<sup>11</sup> As defined in clause 8 of the Bill

<sup>12</sup> In brief summary, defined as an indictable offence or one which may be treated as indictable (clause 3).

<sup>13</sup> As defined in clause 3 of the Bill



is a disqualifying purpose if taken on its own, or taken with one or both of the other purposes referred to in clause 8 (2), is something which is 'more than ancillary or incidental to the other purposes' of the entity.

### ***General observations***

There are two different tests referred to in the Consultation Paper which might be used in determining whether an entity's purpose is charitable or non-charitable and resultantly registrable as a 'charity' as defined by the law.

### **Dominant purpose test**

The first test is the 'dominant purpose' test. The 'dominant purpose' test, as used in the 2003 Exposure Draft Bill, is a two part test requiring that:

- (1) the entity has one or more purposes that are charitable; and
- (2) any other purposes that it has are purposes that are further in aid of, and are ancillary or incidental to, its purposes that are charitable.

### **Exclusively charitable test**

The second test is the 'exclusively charitable' test. The 'exclusively charitable' test, on the face of it, requires that an entity be established for charitable purposes only.

The Consultation Paper<sup>14</sup> states that 'the Bill could clarify that an entity cannot have any independent non-charitable purposes. Any other purposes, which if viewed in isolation, would not be charitable, could only be incidental or ancillary to the charitable purpose'. However, such a clarification would arguably render the test a 'dominant purpose' test under another name.

### **Consideration**

The two purposes tests are essentially an option between an 'open system based on broad concepts or closed system of listed charitable purposes'<sup>15</sup>.

The adoption of the 'exclusively charitable' test over the 'dominant purpose' test may have the effect of excluding an entity that is predominantly charitable but which carries carry on ancillary purposes to those of its purposes which are clearly charitable. On the other hand, a concern could be that the adoption of the dominant purpose test over the exclusively charitable test may have the effect of providing privileges accorded to charities to non-charitable entities - thereby undermining the distinct concept of charity in the law.<sup>16</sup>

In order for Australia to adopt an 'exclusively charitable' purposes test similar to that enacted in England, it may be necessary to enact an explicit and comprehensive list of charitable

<sup>14</sup> The Treasury, *Consultation Paper – A Definition of Charity*, Content ID 2161 (2011)

<sup>15</sup> Matthew Dwight Turnour, *Beyond Charity: Outlines of Jurisprudence for Civil Society* (D Phil Thesis, Queensland University of Technology, 2009) 96

<sup>16</sup> G E Dal Pont, *Law of Charity* (1<sup>st</sup> ed, 2010)



purposes. A comprehensive list of exclusively charitable purposes would provide certainty. It would support the 'exclusively charitable purposes' approach to the definition of 'charity'. If an exclusively charitable test was enacted without a list of charitable purposes to give more content to the concept, then it would be left to the regulatory body and/or the courts to establish what purposes are exclusively charitable.

By way of contrast, the Exposure Draft Bill adopted the approach (largely reflecting the common law) that charitable purposes in legislation included a number of identified purposes (such as advancement of education or of social or community welfare) but also included "any other purpose which is beneficial to the community".

This approach provides flexibility and allows for development of concepts and ideas within the community as to the meaning of 'charity' -- but it also does give rise to a greater degree of uncertainty than may otherwise be the case.

It is expected that the Australian Charities and Not for Profit Commission ("ACNC"), as regulator of the charities and not-for-profit sector, would be responsible for 'determining charitable and public benevolent institution status for all Commonwealth purposes'<sup>17</sup>.

The decision to enact a broad or narrow 'purposes' test may also be considered by reference to ACNC's role as regulator to implement and follow such a test. A broad 'purposes' test would tend to give the ACNC greater scope in granting charitable status to an entity. A narrow 'purposes' test would tend to limit the scope for the ACNC in granting an entity charitable status. In either case, the decision could be judicially reviewable.

### **Consultation Question 1 - Red Cross Submissions**

Red Cross considers that, viewed overall, the broad scope of the Exposure Bill draft provisions is appropriate and workable, including in particular its definition of 'charity'.

The definitions provide a degree of flexibility in respect of the purposes of an entity to enable it to be classed as a 'charity', as the dominant purpose must be charitable, the effect of which is that the purposes must either be charitable of themselves or be purposes which are directed towards the achievement of the purposes of the entity which are charitable.

They recognise the practical reality that many charities carry on some activities which are not directly charitable (for example, retailing activities to raise funds) but which are necessary to support or are directed towards supporting the charitable activities of the entity (the surplus of the funds so raised being used to support the charitable activities of the entity and so work towards achieving its charitable purposes).

At the same time the Exposure Draft definitions protect against the 'charity' status being given to entities which have other major non-charitable purposes, by requiring that any such

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<sup>17</sup> ACNC, *Phase Three: Setup ACNC as Regulator*, Australian Charities and Not-for-profits Commission Implementation Taskforce < <http://acnctaskforce.treasury.gov.au/content/Content.aspx?doc=phasethree.htm> > at 25 November 2011



other purposes must be in aid of ancillary to the charitable purposes **and** also be in furtherance of the charitable purpose or purposes.

However Red Cross suggests some modifications of components of the definitions, as set out below and in response to subsequent Consultation Questions.

Other questions and issues are dealt with in the context of further submissions in relation to particular Consultation Questions.

### **Consultation Question 3:**

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

The Exposure Draft Charities Bill 2003 provides as follows:

#### **“7 Public Benefit**

- (1) A purpose that an entity has is for the **public benefit** if and only if:
  - (a) it is aimed at achieving a universal or common good; and
  - (b) it has practical utility; and
  - (c) it is directed to the benefit of the general community or to a sufficient section of the general community.
- (2) 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.
- (3) Subsection (2) does not limit the other circumstances in which a purpose is not for the benefit of the general community or to a sufficient section of the general community.”

The exposure draft does not provide a positive definition of ‘public’ or ‘sufficient section of the general community’.

In large part, it seeks to give statutory form to the common law.

For example, the common law test for ‘sufficient section’ was established in *Oppenheim v Tobacco Securities Trust Co Ltd*<sup>18</sup>. In this case, a trust established for the purpose of providing education benefits to children of employees of British American Tobacco was held not to amount to a charity. The decision was based on finding the trust was not sufficiently public because there was a ‘personal nexus’ between the donor and beneficiaries:

‘A group of persons may be numerous but, if the nexus between them is their personal relationship to a single propositus or to several propositi, they are neither the community nor a section of the community for charitable purposes’<sup>19</sup>

<sup>18</sup> [1951] AC 297

<sup>19</sup> *Oppenheim v Tobacco Securities Trust Co Ltd* [1951] AC 297 at 306



In the case of *Verge v Somerville*<sup>20</sup>, Verge had died having bequeathed in his will his residuary estate unto the trustees for the time being of the repatriation fund or other similar fund for the benefit of New South Wales returned soldiers. The issue was whether the gift was charitable having regard to the beneficiaries.

In judgment of the Privy Council, Lord Wrenbury said that ‘to be a charity a trust must be for the benefit of the community or of an appreciably important class of the community<sup>21</sup>.’

In the case of *Dingle v Turner*<sup>22</sup>, a trust of a bequest of £10,000 was to be applied to pay pensions to poor employees of E Dingle & Co. The issue was whether the class of beneficiaries was considered ‘public’ or a ‘sufficient section of the public’. Lord Cross also considered the issue:

“In truth the question whether or not the potential beneficiaries of a trust can fairly be said to constitute a section of the public is a question of degree and cannot be by itself decisive of the question whether the trust is a charity. Much must depend on the purpose of the trust. It may well be that, on the one hand, a trust to promote some purpose, prima facie charitable will constitute a charity even though the class of potential beneficiaries might fairly be called a private class and that, on the other hand, a trust to promote another purpose, also prima facie charitable, will not constitute a charity even though the class of potential beneficiaries might seem to some people fairly describable as a section of the public.”

These indications of the common law principle are narrow and could be expanded and clarified either in the definition itself or though allowing the guidance from ACNC to be flexible within an expanded definition.

### ***The ‘public v private’ distinction and ‘numerically negligible’***

‘Sufficient section of the general community’ is negatively defined in the Charities Bill 2003 so that a purpose is deemed not to be directed to the benefit of a sufficient section of the general community, if the number of people to whom the benefit is directed is numerically negligible.

In *Oppenheim v Tobacco Securities Trust Co Ltd*<sup>23</sup> Lord Simonds stated:

“These words “section of the community” have no special sanctity, but they conveniently indicate **first**, that the possible (I emphasise the word “possible”) beneficiaries must not be numerically negligible, and **secondly**, that the quality which distinguishes them from other members of the community, so that they form by themselves a section of it, must be a quality which does not depend on their relationship to a particular individual.<sup>24</sup>”

<sup>20</sup> [1924] AC 496

<sup>21</sup> *Verge v Somerville* [1924] AC 496 at 499

<sup>22</sup> [1972] 2 WLR 523.at 624

<sup>23</sup> [1951] AC 297

<sup>24</sup> *Oppenheim v Tobacco Securities Trust Co Ltd*[1951] AC 297 at 298



However, the Bill does not include as a relevant factor the relationship between the entity and the beneficiary.

### **Consultation question 3 - Red Cross submissions**

Red Cross submits that it would be useful to ensure that charitable assistance to vulnerable persons should not be excluded by a solely numerical test (i.e. that the group is numerically negligible), by utilizing rather a multi-factor test which would include a negative factor that the beneficiaries of a charity cannot be a group of persons who are distinguished by their relationship to a particular individual or individuals.

Utilization of this approach:

- would exclude the potential for a purely private benefit to be regarded as charitable (assuming such a benefit to be not within the intended class of charitable beneficiaries, for reasons of public policy) but
- would not have the potential to exclude from potential charitable assistance relatively small numbers of persons who might otherwise be potential beneficiaries.

This is especially important given the absence of any objective criterion for determining when the condition of 'numerically negligible' is to be satisfied.

In particular, Red Cross reiterates its approach in relation to Recommendation 13 of the 2001 *Inquiry into the Definitions of Charities and other Organisations*<sup>25</sup>, as noted in the Red Cross submissions to the Productivity Commission Inquiry<sup>26</sup> that the 'purposes' of 'charitable purposes' be amplified by examples by way of guidance (as proposed by the Inquiry) on a basis which is expressly non-exclusive.

This approach gives substantive content to the concept whilst allowing for reasonable change and development over time to meet changing circumstances.

### **Consultation question 5:**

**Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in 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?**

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<sup>25</sup> See [www.cdi.gov.au/report/cdi\\_chap16.htm](http://www.cdi.gov.au/report/cdi_chap16.htm)

<sup>26</sup> Australian Red Cross response to the Draft Research Report on the Contribution of the Not-for-Profit Sector (Productivity Commission, released 14 October 2009).





### Consultation 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?**

The Red Cross proposes to put its submission on these two related questions together.

There are several separate methods of defining ‘for the public benefit’, through:

- the enactment of legislation;
- litigation and subsequent common law; and/or
- non-binding guiding principles published by the ACNC; and/or
- a combination of the above methods.

The key elements in considering the desirability of each method include:

- certainty,
- flexibility,
- time and cost, and
- ease of understanding and enforceability.

In practice, no matter which approach is utilised, there will be some degree of uncertainty for a period as the legislation operates especially in its early stages.

- A definition through the enactment of legislation provides a degree of certainty, but this can be rigid. It may not be easily amended to reflect the potentially changing views of the community or, perhaps more significantly, to reflect changes which are desirable in the light of experience.
- A definition through litigation and subsequent common law may result in a well-formed definition becoming established over time, but it may still lack certainty (especially early in the life of the legislation) and, in any case, requires the expenditure of significant time and money to pursue litigation.
- A definition through non-binding guiding principles published by the ACNC provides a degree of certainty and flexibility, but it is non-binding and of course (in common with any definition whether included in legislation or not) open to litigation.<sup>27</sup>

It must be taken into account that the definition issues relate to a sector which is not-for-profit. Many of its participants are small organisations (frequently based in particular communities) which often are not well-resourced and all of whom are undertaking their activities of a charitable kind. This consideration points to provision of guidance from the ACNC so as to provide practical assistance to not-for-profit entities, especially those which are smaller or not well-resourced.

<sup>27</sup> United Kingdom, Charity Commission, ‘*Summary Guidance for Charity Trustees*’ <<http://www.charity-commission.gov.uk/Library/guidance/pbsummarytext.pdf>> at 25 December 2011



If a priority attribute is flexibility, an approach relying on common law and non-binding guidance principles could be adopted<sup>28</sup>.

The Charity Commission of England and Wales publishes Operational Guidance ('OG') drafted to cover policy and practice based on charity law.

OG's are a cost effective, efficient and flexible method of assisting entities with the interpretation and application of legislation.<sup>29</sup>

### Consultation questions 5 and 6 - Red Cross submission:

The United Kingdom model in relation to charities (similar to tax rulings under well-established practice under legislation in Australian law<sup>30</sup>) provides a useful approach. It provides practical guidance for the parties and substantially reduces uncertainty, whilst leaving it open to parties to take a different view if they wish and, if need be, to litigate specific issues<sup>31</sup>.

<sup>28</sup> In a recent article, Dr Paul Harpur notes that:

“One major benefit inherent in a Charity Commission is its flexibility. Charities meet the needs of the community. The community continually changes and charities must move to meet the community's needs. Legislative definitions of what constitutes the ‘public benefit’ may not move with the changes and could impose yesterday's answers to tomorrow's public problems.”

See ‘Charity Law's Public Benefit Test: Is Legislative Reform in the Public Interest?’, (2003) 25 *Queensland University of Technology Law and Justice Journal* 422

<sup>29</sup> The ‘Operational Guidance’ published by the Charity Commission (United Kingdom) identifies the concept of ‘Public Benefit’ as follows:

**“Principle 2: Benefit must be to the public, or section of the public**

- Principle 2a The beneficiaries must be appropriate to the aims
- Principle 2b Where benefit is to a section of the public, the opportunity to benefit must not be unreasonably restricted:
- \* By geographical restrictions; or
  - \* By ability to pay any fees charged
- Principle 2c People in poverty must not be excluded from the opportunity to benefit
- Principle 2d Any private benefit must be incidental”

<sup>30</sup> Authority for Public Tax Rulings under *Taxation Administration Act 1953* (Cth)

Division 385-5 (1) The Commissioner may make a written ruling on the way in which the Commissioner considers a relevant provision applies or would apply to:

- (a) entities generally or a class of entities; or
- (b) entities generally or a class of entities in relation to a class of Schemes; or
- (c) entities generally, or a class of entities, in relation to a particular scheme

<sup>31</sup> The UK Charities Act<sup>31</sup> does not explicitly define ‘for the public benefit’. Instead, the Charity Commission is given the statutory duty of issuing guidance in pursuance of its public benefit objective<sup>31</sup>, so as to ‘to promote awareness and understanding of the operation of the public benefit requirement’.

The Commission is empowered to revise from time to time any guidance. In that connection the Commission is directed to carry out such public and other consultation as it considers appropriate before issuing any guidance prescribed under the Act or unless it considers it unnecessary to do so before revising any such guidance.



In addition, given the vast diversity in size and resources of the participants in the sector, a high priority should be to accord preference to any method which gives a reasonably high degree of certainty whilst allowing flexibility, as well as ready access at low cost to reliable information. Such an approach also provides for ease of compliance.

Consequently, Red Cross submits that a broad definition of 'public benefit' of the kind proposed in the Charities Bill 2003 may be adopted, subject to the point that the 'numerically negligible' criterion for exclusion from public benefit should be varied as noted above

Beyond this, the Red Cross submits that it is preferable to leave the development of the meaning of 'the public benefit' to the provision of guidance material by the ACNC, based on a suitable empowering provision in the legislation.

The ideas of 'for the public benefit' can of course still be developed by case law, if parties wish to clarify any uncertainties or ambiguities. This approach also allows a degree of flexibility and provides a capacity for the concepts involved to evolve and develop over time.

#### **Consultation question 10:**

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

On the basis of the current approaches to definition of 'charity', a legislative definition of a charity will include the requirement that an entity have exclusively charitable or that it have dominantly charitable purposes.

In addition, it is proposed in the 2003 definition that there be a prohibition on activities of a charity that are not in furtherance or in aid of its charitable purpose(s) operates to restrict the activities of a prospective charitable entity as does the requirement that the entity not have disqualifying purposes.

Professor Dal Pont suggests that an activity test is not always necessary and should be a secondary test where the charitable purpose is unclear.<sup>32</sup> He describes three main circumstances where it may be necessary to look to activity to substantiate the dominant charitable purpose:

- where there is doubt about whether a purpose stated in a governing document as the main purpose is in fact the main purpose. In this case the substance or facts of the matter will prevail over the formulation of the governing documents if the latter are proved to be misleading;
- where an entity's governing documents do not clearly indicate its main object. The activities may serve to indicate the relative weight to be accorded to each purpose; and

<sup>32</sup> [http://www.cdi.gov.au/report/cdi\\_chap12.htm](http://www.cdi.gov.au/report/cdi_chap12.htm)



- where an entity lacks governing documents or where they are informal or incomplete. It is the nature of the entity as substantiated by its activities that will determine the entity's status.<sup>33</sup>

In contrast, Kirby J<sup>34</sup> in *Word Investments* placed significant weight on the activities of an entity, stating that --

'173. *Identifying the entity's real purposes:* With respect, there are real dangers in assigning too much importance to the constituting document. This is especially so now that the doctrine of *ultra vires* in relation to companies has been discarded as an important element in Australian corporations law.

174. The constituting document can obviously be drafted widely or ambiguously. Its language may generate uncertainty as to the true purposes of the institution propounded as charitable. It may contain multiple purposes but not indicate whether they are all of equal importance or whether some purposes are subsidiary to others. The document may not identify the outer limits of the purposes which the institution may pursue. For these reasons, in my opinion, the real discrimen for the characterisation of an entity propounded as a "charitable institution" is what that entity actually does and what purposes it actually pursue...'<sup>35</sup>

Murray identifies 'the inherent difficulty with ...[the common law approach]... is determining when powers or activities are to be characterised as being 'carried on in furtherance of a charitable purpose', rather than evidencing a separate non-charitable purpose'<sup>36</sup>

### Consultation question 10 - Red Cross submission

The Red Cross notes charitable entities pursue a range of activities in support of their charitable purposes:

- their dominant purpose is (and must be) charitable and much of their activity in support of achieving that objective is on any measure 'charitable';
- some apparently commercial activities of a charitable entity may also have a charitable characterisation (e.g. in the provision in the commercial activities of employment opportunities for persons with disabilities); but
- an entity may also have other activities which do not have that characterisation of both generating a surplus and supporting the direct achievement of the charitable purpose, or at least not to any substantial degree.

<sup>33</sup> G E Dal Pont, *Law of Charity* (2010)

<sup>34</sup> [2008] HCA 55, at paras. 173 and 174 in a dissenting judgement; citations omitted

<sup>35</sup> *Commissioner of Taxation v Word Investments* [2008] HCA 55

<sup>36</sup> Ian Murray, 'Charity Means Business – Commissioner of Taxation v Word Investments Ltd' 31 *Sydney Law Review* 309 at 316



For example, an entity may carry on retail activities which have no direct connection with its other charitable purposes directly but that activity is carried on only for the purposes of raising funds for use in connection with the dominant charitable purpose.

In that case, the commercial activities do not have a 'purpose' of generating a surplus which is independent of the dominant purpose, if it is also the case that the surplus is intended to be and is directed to support the charitable activities.

In this way, the activities which are not directly activities which achieve the charitable purposes of the entity should be for the 'furtherance of' the dominant charitable purpose or be ancillary or incidental to the main charitable purpose.

But there can be practical difficulties of determining that the commercial activities are being carried on in support of or in furtherance or aid of the charitable purposes.

These potential difficulties arise for a range of reasons including;

- the investment required in the commercial activities in order to establish and develop them (whether that is by way of borrowings, provision of capital from the organisation's own resources, or from retention of some or all of the surplus (if any) generated by the activity);
- even if the commercial business of the entity is generating a surplus, it needs working capital and so even to that extent it may be that not all of the 'surplus' will be devoted at any particular time to the charitable purpose;
- the time period over which the above circumstances may arise may be highly variable, so it may be difficult at any point of time to be satisfied that the activity is in fact being carried on in support of the charitable purpose.

There may be no simple or indeed single resolution or approach, given the practical necessity for many charitable entities to carry on some commercial activities as one of a number of means of providing a diversity of secure and independent funding sources to better support and fulfil their charitable purpose.

However, potential concerns about inappropriate activities of an entity which is a charity are at least in part controlled by the requirement of the definition that the activities of a charitable entity must be in furtherance of or in aid of the dominant charitable purpose.

In addition, this requirement could be reinforced by development of some general guidance from the ACNC (given suitable enabling legislative provisions).

It is to be recalled that the non-charitable purposes are purposes which are to be (1) in aid of or further the charitable purpose; **and** (2) are ancillary or incidental to the charitable purposes. The need to place reasonable limits on the non-charitable purposes (if they are in fact able to be so characterised) is sufficiently satisfied by the first requirement. Furthermore, the first requirement also reflects the definitional requirement that an entity is a charitable entity provided (amongst other things) that it does not engage in activities that do not further or are not in aid of its dominant purpose.



In any case, Red Cross submits that it could be desirable to remove the second element in the definition of 'dominant purpose' and consideration should be given to doing so..

## Consultation 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?**

The definition of 'charity' has the prohibition elements referred to above. One of those is that a 'charity' cannot have the purpose of 'attempting to change the law or government policy'. The draft also provides that the 'disqualifying purpose' is only operative if it is on its own or when taken with other purposes 'more than ancillary or incidental to the other purposes' of the entity. This element of the definition proposed in 2003 has been effectively superseded by the approach adopted by the High Court of Australia, after the Charities Bill definition was proposed.

In its decision in late 2010 in *Aid/Watch Incorporated v Commissioner of Taxation*<sup>37</sup> the High Court of Australia considered certain aspects of the question whether 'political activity' undertaken by a body had the result that the body could not be endorsed as a 'charitable institution' for the purposes of the income tax legislation.

In its summary of the decision, the Australian Tax Office noted as follows:

"The court was of the view that the origin of the apparent "political activities" disqualification notion (i.e., *Bowman v Secular Society Ltd* [1917] AC 406) was decided in a context which did not take account of the Australian Constitution, and the inherent right of constituents for agitation and communication about matters affecting government, politics and policies.

The court decided that in Australia, there is no general doctrine which excludes from charitable purposes "political objects".

The court held that the concern of and attempts by Aid/Watch to promote the effectiveness of aid delivery was clearly aimed at the relief of poverty and that the promotion and generation by lawful means of public debate about matters affecting the better use of and delivery of Australian aid was a matter falling within the fourth *Pemsel* head, i.e., purposes beneficial to the community.

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<sup>37</sup> [2010] HCA 42



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### **Consultation question 12 – Red Cross Submission**

In carrying out its mission, Red Cross engages in public advocacy and lobbying with the aim of relieving poverty, and improving health or education. This activity includes making submissions to Governments and political parties, researching issues of concern in these areas, developing public policy proposals, and raising these issues in debate in the mass media. As indicated in its strategic plan 2010, The International Movement of the Red Cross and Red Crescent Societies has committed its resources to increasing advocacy roles as one of the most important tools for achieving the mission of the Movement.

Red Cross consequently submits that the definition of 'charity' should provide for and allow activities which are intended to change the law or government policy, if these activities are in aid of or further related to an entity's dominant purposes which are charitable. The definition of 'disqualifying purpose' should be revised accordingly.

Red Cross suggests that the definition should be amended in this respect in a manner which is consistent with the decision of the High Court of Australia in the ***Aid-Watch Case*** so as to avoid the unnecessarily restrictive consequences of the definition as it was proposed in 2003.

### **Consultation question 13**

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

#### **Consultation question 13 - Red Cross submission**

The purpose of supporting a candidate for political office should remain a disqualifying purpose, as drafted in the Charities Bill 2003. The insertion of the phrase 'or opposing;' immediately following the word 'supporting' is appropriate.

Red Cross notes and supports the approach of ACOSS in its submission to the Productivity Commission Inquiry; as follows:

'ACOSS particularly supports the recommended clarification around advocacy and charity which stated that:

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<sup>38</sup> ATO, Decision Impact Statement, 11 May 2011



‘advocating on behalf of those the charity seeks to assist, or lobbying for changes in law and policy that have direct effects on the charity’s dominant purpose, are consistent with furthering a charity’s dominant purpose. We therefore recommend that such purposes should not deny charitable status provided they do not promote a political party or a candidate for political office’<sup>39</sup>

The purpose of advocating a political party or cause<sup>40</sup> should be amended by removing the word ‘cause’ from the disqualifying purposes. Advocating a cause should not be a disqualifying purpose but rather subjected to the charitable purpose test under section 10 and the public benefit test under section 6.

As an alternative, ‘cause’ could be defined as ‘political cause’ so as to avoid an overly general interpretation. The ACNC could publish Operation Guidance to clarify the types of activities that constitute ‘political cause’.

Red Cross submits that the reference to ‘the purpose of attempting to change the law or government policy’ in the definition of a disqualifying purpose should be revised, in the manner noted earlier in relation to the ‘disqualifying purpose’ submissions.

#### **Consultation question 14:**

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

In respect of the definition generally, Red Cross submits that there should not be any additional specific restrictions upon the types of entities (i.e. the types of legal structures) which can be a ‘charity’ in addition to those specified.

The suggested groups of excluded entities, which include individuals, partnerships, political parties, superannuation funds and government bodies do appear appropriate

However, by its Charter<sup>41</sup> and as a consequence of the **Geneva Conventions Act 1957** (as amended to date)<sup>42</sup>, Red Cross is expressly recognised as being an auxiliary to the public authorities in the humanitarian field.

Consequently, Red Cross submits that it is necessary, to avoid any doubt that may otherwise arise, that any performance by Red Cross of its functions as an auxiliary to the public authorities does not mean that it is, or is to be regarded as being, a ‘government body’ for the purposes of the definition of ‘charity’.

<sup>39</sup> Submission to the Productivity Commission ‘The contribution of the Not-for-Profit Sector p 29

<sup>40</sup> As set out in clause 8 (2) (a) of the Bill.

<sup>41</sup> Clause 2

<sup>42</sup> **Geneva Conventions Act 1957**





## Consultation question 15

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

### ***Charities Bill 2003***

The Exposure Draft Charities Bill 2003 imposes a ‘control’ test for the identification of a government body whereby a ‘government body’ includes one which is ‘controlled by’ government.<sup>43</sup> The Exposure Draft Charities Bill 2003 does not clarify how ‘control’ should be determined or the degree of control necessary, if degree is a consideration, to preclude an entity from attaining charitable status.

### ***Central Bayside Decision***

*Central Bayside General Practice Association Limited v Commissioner of State Taxation*<sup>44</sup> (“Central Bayside”) is a 2006 High Court decision made after the preparation of the Exposure Draft Charity Bill 2003. The decision represented a common law shift away from a test of mere control. A majority<sup>45</sup> of the Full Court of the High Court of Australia said the question [is]:

‘Whether in truth there was here governmental control and influence to such an extent that the appellant was carrying out the Department’s purposes rather than its own purpose’<sup>46</sup>

In *Central Bayside*, Callinan J stated:

‘The appellant in this case was entirely voluntarily established. It is not, and has never been, part of a government department. It does not owe its existence to a statute. It is quite separate from government’<sup>47</sup>

### ***Charities Act 2006 (UK)***

The *Charities Act 2006* (UK) imposes no express prohibition against a charitable entity taking the form of an individual, a partnership, a political party, a superannuation fund or a government body.

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<sup>43</sup> Section 1 (1) of the Exposure Draft provides as follows:

“**government body**” means:

- (a) the Commonwealth, a State or a Territory; or
- (b) **a body controlled by the Commonwealth, a State or a Territory; or**
- (c) the government of a foreign country; or
- (d) a body controlled by the government of a foreign country.” (our emphasis)

<sup>44</sup> (2006) 228 CLR 168 at 181

<sup>45</sup> Gleeson CJ, Heydon and Crennan JJ

<sup>46</sup> *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168 at 24

<sup>47</sup> *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168 at 181



However, the Charity Commission UK has published guidance on the independence of charities from the State. The Charity Commission considers a number of potential characteristics typical of a charity being characteristic atypical of State authorities and performs an assessment of the body.<sup>48</sup> 'The fewer of these characteristics that a body displays, the more likely it would be that it had been created in order to promote the local authority's interests and thus for a non-charitable purpose.'<sup>49</sup>

Whilst not all of these indicators would necessarily be appropriate or operate in the Australian context, the factors referred to are helpful in identifying and confirming the need to ensure that the provision of services provided by a charitable entity under contract for services with a government does not mean that the entity is a 'government body'.

### ***The establishment of Red Cross***

Red Cross is a member of the international federation of Red Cross and Red Crescent Societies, which in conjunction with the International Committee of the Red Cross constitutes the Red Cross Red Crescent Movement..

The Red Cross achieves recognition as a National Society under Article 4 of the Statutes of the Movement<sup>50</sup>. There are 10 conditions imposed by the Statute of the Movement for recognition as a National Society.<sup>51</sup> Condition 3 requires the Red Cross:

'Be duly recognized by the legal government of its country on the basis of the Geneva Conventions and of the national legislation as a voluntary aid society, auxiliary to the public authorities in the humanitarian field'<sup>52</sup>

Consequently, Red Cross plays a unique role in assisting persons in need within the communities through a distinctive relationship with the government.

'A National Society's relationship with government in no way implies that the government controls or directs the work of a National Society. Each government must recognise the National Society in some legal form, and by endorsing the National

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<sup>48</sup> Characteristics include:

1. is set up with independent trustees who are not subject to a conflict of interest between the charity and the local authority;
2. is in a position to obtain its own independent professional advice;
3. negotiates any funding or leasing arrangements with the local authority at arm's length;
4. has arrangements in place which preserve the trustees' fundamental discretions as to the selection of beneficiaries and the provision of services and does not require the trustees simply to give effect to the policies and wishes of the local authority; and
5. has trustees who are free to make their own decisions on matters outside any funding arrangement.

<sup>49</sup> United Kingdom, Charity Commission, '*Local Authorities and Trustees: Issues Connected with the Independence of Trustees Particularly when The Trustees are Nominated by Local Authorities*' <[http://www.charitycommission.gov.uk/About\\_us/OGs/g056b002.aspx](http://www.charitycommission.gov.uk/About_us/OGs/g056b002.aspx)> at 7 December 2011

<sup>50</sup> *Statutes of the International Red Cross and Red Crescent 1986* (ICRC)

<sup>51</sup> *Statutes of the International Red Cross and Red Crescent 1986* (ICRC) Article 4

<sup>52</sup> *Statutes of the International Red Cross and Red Crescent 1986* (ICRC) Article 4 (3)



Society, the government and authorities are required to allow the National Society to work in alignment with the Fundamental Principles.<sup>53</sup>

The Principle of 'independence' is very clear: National Societies 'while auxiliaries in the humanitarian services of their governments and subject to the laws of their respective countries, must always maintain their autonomy.'<sup>54</sup>

Directions for the different types of work to be carried out by National Societies come from:

- International Conferences
- General Assembly
- Council of Delegates
- Strategic Movement Documents

However, directions come from the internal assessment of the National Societies themselves, based on the needs of their own communities.

### ***Red Cross as 'auxiliary to the public authorities in the humanitarian field'***

As noted earlier, the Royal Charter under which Red Cross is established in Australia refers to the role of Red Cross as 'auxiliary to the public authorities in the humanitarian field'.

The auxiliary role is a technical term to express the specific and distinctive partnership a National Society should have with its government in providing public humanitarian services. Historically, these services related to times of war under the Geneva Conventions and their Additional Protocols, however there have been many occasions in the last century which have resulted in National Societies taking on a range of broad tasks involved in addressing the needs of the most vulnerable world-wide.<sup>55</sup>

### ***Red Cross and 'government'***

In assessing whether Central Bayside General Practice Association Limited was controlled by government, Callinan J observed that Bayside:

- was entirely voluntarily established;
- was never part of a government department;
- did not owe its existence to a statute; and
- was quite separate from government.

<sup>53</sup> Australian Red Cross, *Promoting Respect for International Humanitarian Law: A Handbook for Parliamentarians* <[http://www.redcross.org.au/files/IHL\\_Parliamentarians\\_Handbook.pdf](http://www.redcross.org.au/files/IHL_Parliamentarians_Handbook.pdf)> at 7 December 2011

<sup>54</sup> International Federation of Red Cross and Red Crescent Societies, *'Independence'* <<http://www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles/independence/>> at 7 December 2011

<sup>55</sup> Australian Red Cross, *Promoting Respect for International Humanitarian Law: A Handbook for Parliamentarians* <[http://www.redcross.org.au/files/IHL\\_Parliamentarians\\_Handbook.pdf](http://www.redcross.org.au/files/IHL_Parliamentarians_Handbook.pdf)> at 7 December 2011



Upon application of these characteristics to Red Cross, it is clear that Red Cross was and remains entirely voluntarily established and it has never been part of a government department. On this basis, it cannot be said to be 'controlled' by government.

However, it may be arguable that as Red Cross:

- indirectly owes at least part of its roles in Australia to statute; and
- is, under its Royal Charter, an auxiliary to the public authorities in the humanitarian field,

it is not distinctly 'separate' from government .in the sense which may have been intended by Justice Callinan's judgement.

Aspects of the role of the Red Cross in Australia are associated with the ratification of the Geneva Conventions by Australia.<sup>56</sup> In this context, 'auxiliary' may be defined as helpful to foreign and allied troops in the nation's service or as 'subsidiary'.<sup>57</sup> In addition, 'auxiliary' in this context could be construed as 'supplementary'.

It is possible that, were the Exposure Draft Charities Bill 2003 to remain in its current form, Red Cross could be considered less than 'quite separate' from government. The Exposure Draft Charities Bill 2003 is silent on the degree to which an entity can be 'controlled' by government before being precluded from charitable status.

It is possible, though unlikely, that Red Cross (as auxiliary to government, in the sense if auxiliary to the public authorities in the humanitarian field) could be regarded as 'controlled' by government even in this very limited sense..

### **Consultation question 15 - Red Cross submission**

So as to avoid any possible room for uncertainty, Red Cross submits that it would be useful to have legislative clarification on this matter, by ensuring that Red Cross is not a 'government body' for the purposes of the definition of 'charity', even if the potential for uncertainty on this point is regarded as low.

As well as its activities as an auxiliary to government as explained above, Red Cross undertakes a number and range of activities pursuant to funding agreements with the Commonwealth, State or Territory governments (as do many other charitable entities).

In this respect, Red Cross would not in its view fall within the definition of a 'government body' as defined in clause 3 (1) (b) of the Bill.

However, as this conclusion may be open to argument, Red Cross submits that the definition of 'government body' be amended to protect the charitable status of the Red Cross.

<sup>56</sup> *Statutes of the International Red Cross and Red Crescent 1986* (ICRC) Article 4 (3); *Geneva Conventions Act 1957*

<sup>57</sup> J.B. Sykes (ed), *The Concise Oxford Dictionary of Current English* (6<sup>th</sup> ed, 1976) at 64



For the avoidance of any doubt, Red Cross submits that:

- specific provision should be included to confirm that the conduct of any activities by Red Cross in its capacity as an auxiliary to the public authorities in the humanitarian field should not bring Red Cross within the definition of ‘government body’ for the purposes of the definition of ‘charity’;
- it would be desirable to ensure that the definition of government body excludes an entity which is a charitable entity but which undertakes provision of services to the community under a contract or agreement for the provision of services between the charitable entity and the Commonwealth, a State or a Territory, provided that the contract or agreement does not include any provision for any control or directions by the government of the activities of the entity, other than in connection with the due provision of the specific services provided under the contract.

Furthermore, the application of the definition of ‘government body’ could be one of the subjects upon which the ACNC could provide guidance under specific provisions of the legislation.

### Consultation question 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?**

The list of charitable purposes in the Charities Bill 2003 is appropriate given inclusion of a catch-all clause ‘(g) any other purpose that is beneficial to the community’.

The catch-all clause is a means of providing the courts with the scope for finding ‘new purposes to be charitable.’<sup>58</sup> It has been suggested that ‘an exhaustive list of objects may engender inflexibility and rapid obsolescence’<sup>59</sup>

The list of charitable purposes in the Charities Bill 2003 contains a catch all clause which at first glance makes the need to present an exhaustive list of purposes unnecessary. However, those purposes not listed in the Charities Bill 2003 will involve a higher burden of proof in establishing a charitable purpose than those purposes expressly listed within the legislation.

TR 2005/D6 identifies the concept of ‘harm prevention’ as a charitable purpose and states a ‘harm prevention charity’ is a charitable institution whose principal activity is to promote the prevention or the control of behaviour that is harmful and abusive to human beings. Given ‘prevention’ is not identified as an aspect of advancement, such a charity would be difficult to establish without the express inclusion of such a charity within the legislation.

As the Productivity Commission has noted:

<sup>58</sup> G E Dal Pont, *Law of Charity* (2010)

<sup>59</sup> *Charities: A Framework for the Future*, HMSO, London, 1989, cm 694, p7



'Prevention is a good example of the allocation challenge. There is almost universal agreement that prevention is better than cure, and generally costs far less. Nevertheless, as it is difficult to demonstrate the value of avoiding a cost that would otherwise be imposed by a problem, prevention tends to attract less donor support. This issue is compounded by the exclusion of prevention in the definition of charity as applied for deductible gift recipient status.'<sup>60</sup>

### **Consultation question 16 - Red Cross submission**

The definition of 'Advancement'<sup>61</sup> should be amended to include 'enhancement' as suggested by the Report of the Inquiry into the Definition of Charities and Related Organisations.

Enhancement is a lesser degree of improvement and should be recognised as a method of advancement.

### **Consultation question 18**

#### **What are the current problems and limitations with ADRFs?**

##### ***Introduction***

There are various constraints imposed by the current law on all charitable and other bodies to whom monies are donated for the relief of persons and communities in need as a result of natural and other disasters.

Reform of the law is required to provide a contemporary legal framework to enable flexible and appropriate disaster relief to be provided to people and communities affected by disasters from funds donated for these purposes.

Despite some recent changes there are still significant deficiencies in the tax and other laws governing disaster relief funds.

##### ***The immediate need for reform***

The immediate concerns are the current problems with disaster relief funding – the uncertainties, potential injustices and problems arising from the unsatisfactory state of the law in connection with donated funds which are to be used to relieve the devastating effects of natural and other disasters – particularly, in recent experience, flood and fire.

The relevant law in relation to disaster relief is a combination of Commonwealth taxation law and common law.

Under the law, if a donor is to be entitled to claim and receive a tax deduction in respect of a gift to aid persons and communities who have suffered as a result of a natural disaster in Australia, then:

<sup>60</sup> 2010 Productivity Commission Research Report, *Contribution of the Not-for-profit Sector* p19

<sup>61</sup> Clause 10 (2) of the Bill



- the recipient of the gift must be a 'deductible gift recipient' (or 'DGR'); and
- the fund which is created by such gifts must be endorsed as an 'Australian Disaster Relief Fund' (or 'ADRF').

Satisfaction of those requirements also ensures the preservation of the tax status of the recipient body which is the DGR.

Consequently, when any Government or other body wishes to raise funds to provide relief of people and communities affected by a particular disaster, it is required under the tax law to seek from the Australian Tax Office ('ATO') both DGR status for the specific appeal and ADRF status for the fund created by donations in response to the appeal. These rules apply irrespective of whether the Government fund or the body is endorsed as a 'public benevolent institution' (or 'PBI'), as a 'charitable institution', or in some other way under the tax law.

Appropriately, to be covered by the tax law, a disaster only falls within the law when there has been a declaration of a disaster by the Treasurer of the Commonwealth and a number of statutory conditions have been satisfied (or there is a declaration of disaster or emergency under State or Territory law).

But once these steps have been taken and an ADRF exists, significant problems arise from the restricted purposes for which funds donated to a DGR for an ADRF may be used.

These problems arise equally in relation to a charitable fund endorsed by the ATO as an 'ancillary fund' (such as, in Queensland, the Premier's Disaster Relief Fund). This is because:

- an ancillary fund may only distribute monies to another fund or body which is a DGR; and
- if those monies as so distributed to a DGR are to be used in disaster relief, then the DGR which receives funds from the ancillary fund must also be endorsed by the ATO as an ADRF.

### ***The limits on uses of funds for disaster relief under the current law***

Under the tax law as amended in 2009, an ADRF is a 'public fund' for the following purposes:

"4.1.5 a public fund (including a public fund established and maintained by a public benevolent institution): (a) that is established for **charitable purposes**; and (b) that is established and maintained **solely for providing money for the relief (including relief by way of assistance to re-establish a community) of people in Australia in distress as a result of a disaster** to which subsection 30-45A(1) or 30-46(1) applies."<sup>62</sup>

<sup>62</sup> Table Item 4.1.5 of s.30-45 (1), Income Tax Assessment Act 1997, as amended by Tax Laws Amendment (2008 Measures No. 6) Act 2008



It is not clear to what extent an ADRF may undertake activities beyond direct provision of relief, although the ATO has sought to provide some general assistance about the uses of an ADRF in a Fact Sheet issued on 3 February 2011.

So, whilst these 2009 changes broadened the capacity to include community re-establishment relief as a means of providing for the relief of people, an ADRF still has limited purposes which must be charitable and must provide for the relief of people in distress.

The experience of the Victorian Bushfires Appeal Fund (including the diverse range of needs which arose over time in that case), shows that there are many grey areas in which there is real complexity and conflicting views as to how the donated funds may be validly used, if the tax status of the fund entity and/or the tax status of donations to the fund is not to be put at risk.

### ***Some examples***

By way of example, these problems can and do arise in several ways.

- The scope of 'relief by way of assistance to re-establish a community'.
- The exclusion of losses to individuals which may be characterised as being losses incurred by their businesses, although those losses affect individual proprietors of those businesses.
- Particularly but not exclusively in relation to recent experience of disasters, trying to draw the boundary between an individual loss and a business loss is fraught with difficulty, particularly for business activities carried on in farming communities.
- Similar problems of drawing boundaries arise in relation to the requirement that people be 'in distress', given the longer term psychological or mental health consequences for individuals of their experiences or from the loss of close family members in the disaster. An example is the requirement for orphans to have annual reviews of their trust funds to ensure they are still in 'distress'.

In the case of the Victorian Bushfire Appeal Fund, the ATO provided considerable and much appreciated support to the decision-making of the Advisory Panel by setting out the ATO's views on these issues on a case-by-case basis, in relation to particular proposals for use of funds. However, in doing so, the ATO was of course properly constrained by the limits of the current tax law and concepts.

### ***Some limited extensions of the tax law - in relation to the 2009 Victorian bushfires***

In order to ensure that the use of the Trust Account for the Victorian Bushfire Appeal Fund was within the tax law, a number of specific purposes for the benefit of communities and





individuals (including, to a limited extent, payments to individuals who carried on primary production businesses) were set out in further tax law amendments in 2009<sup>63</sup>.

That it was considered necessary to make these tax law changes (made only in respect only of the 2009 bushfires) illustrates the limits in the general concepts contained in the definition of an ADRF. That they were made also indicates the urgent need for more general reform.

### **Consultation question 18 - Red Cross submission**

Some of the matters referred to above would be resolved by the 2003 draft definition of 'charity'.

Red Cross submits that the present limitations on the nature and scope of activities which are undertaken to assist the recovery of individuals and communities after a disaster should be reviewed and revised particularly:

- to enable far more flexibility in meeting the longer-term needs of individuals and communities; and
- by removing the current requirement that individual persons who are affected by the disaster be in distress (e.g. as noted above).

This may be able to be achieved directly in the legislation or by the ACNC issuing guidance under suitable empowering provisions, in relation to the part of the definition providing for a purpose which is 'beneficial to the community', dealing with disaster relief purposes of that kind.

In addition, in the unlikely case that the funds raised in respect of a particular disaster exceed the needs of persons and communities affected by the disaster in the short, medium and long term, it would be helpful to consider a legislative provision to enable any surplus from the funds provided for relief of particular disaster to be held for the benefit of persons affected by like disasters in the future.

Such a provision could be identified in the published 'appeal intent' as currently occurs in practice – that is, the stated basis or terms upon which a particular disaster relief fund is raised so as to ensure that donors are appropriately informed of the possible future uses if, as may rarely be the case, the relief needs arising from a specific disaster are fully met without exhausting the funds raised in the specific appeal in connection with that disaster.

Similarly, creation of a simple mechanism to provide a basis for collection of funds in advance of a disaster occurring calls for careful consideration.

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<sup>63</sup> Part 1 of Schedule 6, *Tax Laws Amendment (2009 Measures No 5) Act 2009*

