

BAPTISTCARE INC

**Submission into the
Definition of Charity**

9th December 2011

**Dr Lucy Morris
CEO Baptistcare
Adjunct Professor, University of Notre Dame Australia
School of Business Fremantle**

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Context

Baptistcare is a Christian faith-based, Community Benefit (not-for-profit) Charity that will be celebrating its 40th anniversary in 2012. It operates under the Western Australian Associations Incorporations Act 1987. It provides services predominantly to older Australians, in addition to those living with a disability and those struggling with mental health illnesses, together with support for their families. All three client groups access residential, home and community-based services. Baptistcare operates in the Perth metro area, in rural and regional Western Australia and often in remote locations. Approximately 65% of our activity is in regional WA. We employ approximately 1400 people and have over 20 different service locations. Baptistcare is Western Australian and is a member of a national board called Baptist Care Australia (BCA), which acts as a representative and advocacy body at a national level. Baptist Care Australia has a membership comprising all the Baptist community service organisations which operate in every State and Territory around Australia. BCA is set up under the ASIC Rules and Regulations.

Therefore, the issue of a Definition of Charity is something of great interest to Baptistcare and to Baptist Care Australia.

Principles

There are a number of general principles underpinning this response that set the context within which Baptistcare's comments are to be viewed.

Character and Distinctives of the NFP Sector

The NFP sector, or rather, the Community Benefit (CB) or Third Sector is a critical part of the wider civil society. Its contribution to Australian life, its wellbeing and ability to flourish, the capacity building and relationships that arise within a democracy as well as its active, positive participation in a capitalistic society must be acknowledged and celebrated. It is unique to the Australian culture and society and is based on human rights principles and the fundamental philosophy of improving the human condition.

The CB sector has a significant over-representation of women in the workforce and as such, it is an extremely gendered environment, with the last ABS reports indicating a workforce that is 87% female. This in itself has created a character for the sector that is different to the male gendered leadership and male workforce that operates predominantly in the commercial for-profit sector. Its business processes, decision-making processes, leadership style and service delivery models are, therefore, impacted in this gendered space, which contributes to some of its differences. It is critical that this is taken into account when looking at reform.

Leadership for debate and reform should come out of a Sector perspective and not be driven from the Treasury or ATO or ASIC even.

The Name of the Sector

In the first instance, the name 'not-for-profit' should be reviewed and an alternative name chosen. An alternative is 'community benefit organisation' (CBO) or community benefit charity (CBC). 'Not-for-profit' presumes For-profit operations are the norm and it is against this that charities and other community benefit organisations are then automatically measured and required to perform in any review and assessment of their activities.

It assumes that For-profit governance and business drivers are the norm, the default position for all service delivery assessments and judgements. Therefore, significant energy is spent discerning the 'distinctives' for the sector that must take 'personal' responsibility to continue to show its differences from the For-profit sector. It is a work of constant justification for its separate existence and legislative and regulatory framework. It will have an impact on the expectations of a Definition of Charity and how this is implemented and through which Government Department a lead is provided.

For faith-based organisations like Baptistcare, the continued focus on compliance and regulation without the matching focus on the other sector drivers being articulated that motivate the boards, leaders, staff and service users, means that an insufficiently nuanced process is more likely to be used in the establishment of any national body. This is a real concern. The origin of the Consultation Paper i.e., the Treasury is, therefore, a clear example of this inherent assumption. It is really important that the point of view presented by this discourse is held in balance.

Transparency and Accountability

Transparency and accountability are excellent objectives which are sought from the decision to define the meaning of charity, but over time the expectations held within these broad words will be refined and changed to suit current practice. It is interesting that the more this objective i.e., transparency and accountability is held as an achievable outcome, the less trust there is that exists either in the relationships or in any information provided. The homogenisation process of systems that is needed to achieve such laudable outcomes unfortunately, inherently embeds discriminatory practices into the system as the 'many' becomes 'single'; 'diversity' becomes 'mono-cultural', 'monopoly' emerges and captures power, and there is more insistence on one voice and one approach which is not healthy for civil society. Segmentation, lack of accountability and responsibility emerges as no single part of the system or people have the authority to make the decisions. Therefore, any definition of charity needs to be one that allows for diversity, innovation, and flexibility.

Diversity and Innovation

One of the many features that the CB sector offers to the wider civil society is the sheer diversity of small and large organisations, faith-based and secular structures, with both volunteer and paid employees, in rural, regional and city based locations, and individualised, or multi-focused, group and communities services are created and established.

The Definition of Charity also needs to be capable of working with new business models of charities and CBOs to enable innovation and change to emerge.

Currently CBOs can undertake commercial activities if its profits are returned totally to the work of the Association. Partnerships and other social enterprises will have a different fit in the system. New ways of working to meet the changing needs of society and legislation may find that a fixed definition of charity becomes excluding and unhelpful.

The use of Volunteers, tiny Associations and a very local response to an issue means organisations need to be able to flourish at grassroots without bureaucracy and be able to apply for charitable status without the application process being off-putting and excluding in

its definitions and access. The small, sometimes tiny associations must be able to exist within a charitable system as must the large, such as Baptistcare.

General Comments

The Consultation Paper highlights the ongoing interest into the investigation, discussion and research on the issue of the definition of charity over the last 10 to 15 years. In more recent times, the establishment of the Australian Not-for-Profit Charities Commission (ACNC) appears simply to add another complexity into an existing muddle of boards, councils, offices, committees, commissions, strategic expectations and visions without any co-ordinating vision emerging or leadership across the country. To attach the 'defining role of charities', with the necessary requirement for a level of discernment and the application of regulatory and compliance processes to the ACNC makes sense at a micro level, when as a charity one is investigating the way through the maze to make sense of what is being done, what is important and where the engagement needs to be with the charity's limited resources. However, at a macro level, the application of yet another layer of regulation and compliance without matching the removal of discrepancies, control and power at a state and territory level is contributing to the overall sense of disorganisation across the sector.

The concurrent emerging themes are strong – and include:

- The concept of partnership between government and CB sector which is shifting the defining characteristics of partnership, given the locus of power held by government
- Strengthening protocols for the sector
- Standardisation of reporting and compliance obligations
- Oversight of the national regulation and compliance through the ACNC
- The increasing recognition, interest and work on the unsuitability of the International Financial Reporting Standards (IFRS) as they apply to the CB sector
- The harmonisation of the general chart of accounts that has emerged from Queensland
- The inclusion of Service Performance Reporting under the AASB NFP Project
- The drive by Treasury to establish the ACNC in a remarkably short space of time without the essential backing of the States and Territories
- The taxation drive regarding the issue of FBT and Tax exemption that sits lurking in the wings for a point in time for debate
- The challenge of the timeframe proposed for the implementation of the Fair Work Australia decision on Gender Equity Pay for only 150,000 (approximately) women who work in the community sector will cause increasing frustration for those not covered by this ruling, in particular, large chunks of the sector covered by residential aged care
- The local State agendas: in WA this is apparent with the Outsourcing of Human Services known elsewhere in the world as New Public Management and is a strategy that has long been received with caution and hesitation given its implications for the Third Sector and the matching outsourcing of risk, costs and relationships with no discernible improvement for customers and a significant risk of mission-creep.

There is an inevitability about the intersection among all this in the issue of the definition of charity.

All this is by way of providing an overall 'operating environmental analysis' as the backdrop for the discussion of the definition of charity.

Finally, not all the questions asked in the Scoping Study have a response in this document

Questions and Answers:

1. QU.1 The replacement of the 2003 definition from 'dominant purpose' requirement to that of 'exclusive charitable purpose' will inevitably exclude some existing charitable organisations. Our concern points to the issue of maintaining diversity in the sector that is representative of both emerging and established organisations and models of service delivery. Social, cultural and economic imperatives will mean that the difficulty of updating the definition will always lag behind the sector's drivers and responses to community demand.

The driver for the shift appears to be financial rather than social or cultural and it is the latter issues that will be excluded. Charities and CBOs work generally on the margins of society and with minorities, groups, communities and people excluded for one reason or another from mainstream service access. This means that the definition has to have a capacity to be stretched, to encompass new groups, new purposes, including, vigorously challenging sensitive areas of our society and culture that encompass human rights and strong advocacy for unpopular purposes that might be considered not in the public benefit in the prevailing cultural or political view. Our society and our definition must have the capacity to encompass this view.

2. QU.7 For an existing charity to demonstrate its 'public benefit' will cost more in terms of people's time, resources and financially. If this has to be done for individual parts of the organisation, particularly if it is nationally or internationally based, or even state-wide depending on the organisational structures, the workload increases considerably. This is an issue for faith-based organisations with religious affiliations and relationships.
3. QU.8 If the ACNC becomes a permanent institution, its relationship with the CBOs and CBCs will need to be one that manages the balance between compliance and regulation oversight and the provision of access to information that is timely, easy to access and understand and provides advice. The ACNC's role is more aligned with that of regulator than of peak body or membership based facilitator/leader.
4. QU.9 For educational or religious entities, if the presumption of benefit is overturned, it could be significant to the point of catastrophic, depending on the human resources structures of employment, various awards, wages and terms and conditions of employment for staff; the expectations from the community of the entity in question and the accountability through to the community.
5. QU.11 Further clarification is required regarding disqualifying activities to help elicit the entity's status as a charity. The challenge with political activity and clarifying when it becomes more than ancillary or incidental is that nearly all charities are involved in the political activities listed in Point 103 (advocating for a political party or cause; supporting a candidate for political office; attempting to change the law or government policy). These are fundamental strategies and activities for most CBOs and CBCs. Most Peak bodies give organisations advice on how to do all these activities as a way of improving the conditions under which they operate and to achieve changes in policy direction and governmental intention and direction overall. The argument for 'ancillary and incidental' may well be in the eye of the beholder. New strategies will continue to be designed as communications change, government membership changes and how people self-organise with use of social media. It will be very difficult to specify what is or isn't acceptable. Less definition is probably more appropriate in this situation. Certainly it is not necessarily appropriate if the legislation is directed towards subject matters that sit within the four heads of charity are the only things that can be charitable as public debate. That is too restrictive and would be unacceptable.

The discussion in Point 11.5 regarding what removes an entity from being a charity and support the proposal both in 11.5 and 11.6 and 11.7. Additional consultations on this matter would be helpful.

6. QU.19 The Australian Disaster Relief Funds do constitute a unique group of charities, but the wide range of activities that they can cover are difficult and can be very restrictive to interpret and administer. The current legislative arrangements that funds must be expended on the disaster for which they are raised – can be difficult if disasters follow on quickly from one to another in the same region; and there is a lack of flexibility about how donated funds can be applied. Considerations outlined in Point 151 need further discussion.
7. QU. 20 Any transitional arrangements do require further work and discussion. There needs to be an ongoing process for such discussion that has a wide process of consultation and strong communication processes that are timely and thorough with easy access to information.

General Comment

Much of what has been discussed here is still not in the forefront of many charities and CBOs' minds and is not being included in their planning or future expectations. This debate is happening at a national level, with some of the peak bodies, and some of the larger CBCs like Baptistcare. The wider Third Sector is not familiar with the issues and thousands of CBOs and CBCs are dependent on their peak bodies to be active and up to date on their behalf and on their specific issues. Thousands of smaller CBOs will come at this very late indeed with their voluntary boards and management committees expected to work through the implications, with volunteer staff and part time employees. Concerns will probably not arise until the 11th hour prior to any implementation as they work through at a practical level the proposed changes. This means there must be a robust process to be flexible at this stage.

Comments made at the start of this Submission are relevant here. The CB sector is a diverse, complex sector and the inherent danger in the current proposal is that there will be a move towards homogenisation of the sector to minimise the work load of whichever government department has oversight, growing the trend towards management technocracy and a driver to reduce risk because of high risk aversion cultures that exist within the public sector and to facilitate 'one voice' to manage and control and reduce the power of the sector.

Conclusion

The overall decision to pursue a definition of charity as determined by Parliament and cited into law is challenging. There are examples overseas where this has occurred, mostly in the last 8 years and examples pointed to include England, Scotland, Ireland, Northern Ireland and NZ. This is by no mean exhaustive.

The decision to create another body, the ACNC through which to administer this definition within a very short period of time, without the matching commitments from the States and Territories has added further complexity to the existing maze of interrelated bodies and departments involved in this and related matters. The establishment of the ACNC with the right support and leadership that includes people with the appropriate skills and sector experience and knowledge will in the longer term, be helpful.

However, there has been little evidence of cross government commitment at the

Commonwealth and State/Territories to sort out the maze and the drivers/imperatives are left open to question and the transition and implementation will be at risk.

Does this mean that the definition should be shelved? The question appears to have already been answered in this paper and through the Federal Government's recent lists of decisions referred to earlier.

At this stage, Baptistcare would say 'proceed with caution' and have a process to review whatever legislation emerges, on a regular basis to enable new and unconsidered issues to be evaluated and included as required. As importantly, ensure that there are strong communication processes in place to keep the debate open to as many people and organisations as possible.

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