

A definition of charity – Cancer Council Australia response to Treasury consultation paper

Responsibility for the content of this submission is taken by Professor Ian Olver, AM, Chief Executive Officer, Cancer Council Australia. This submission is on behalf of all Cancer Council Australia member organisations, which have an equally high stake in a robust NFP sector, and incorporates their recommendations.

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Overview

Cancer Council Australia welcomes the opportunity to comment on the Australian Government's consultation paper exploring the definition of charity. As the largest federated health charity in Australia, with a 50-year history, Cancer Council Australia has a high stake in the development of a robust not-for-profit sector in Australia underpinned by a clearer definition of charity.

Therefore, we support the Productivity Commission's recommendation that a statutory definition of charity will assist in strengthening the sector.

The charity sector's contribution to the health and wellbeing of Australians is well-documented. We believe a number of the key definitive points of a charity are set out in the 2003 Charities Bill. However, further clarification is required to ensure these definitions support the key objectives of a robust charity sector.

For example, as stated in our response to question 12, it is vital that charitable organisations retain the right to seek government policy changes that are clearly in the interests of their stakeholders, provided such advocacy does not equate to direct party political activity. We trust that Treasury will consider our responses to the questions in the consultation paper, as follows.

About Cancer Council Australia

Cancer Council Australia's goal is to prevent cancer and reduce the burden of illness, disability and death caused by cancer. Cancer Council Australia seeks to achieve this largely by the development and promotion of effective evidence-based cancer control policy and programs in Australia.

Cancer Council Australia acts nationally on behalf of its member organisations, the eight state and territory Cancer Councils, to advise the Australian Government and other bodies on practices and policies to help prevent, detect and treat cancer. Cancer Council Australia also advocates for the rights of cancer patients to best treatment and supportive care.

The eight state and territory Cancer Councils work independently and together, through Cancer Council Australia, to undertake and fund cancer research, prevent and control

cancer (through effective policy, programs and education campaigns), and provide information and support for people affected by cancer. Thanks to community support, the Cancer Councils are both the leading non-government funders of cancer research in Australia and provide a comprehensive range of community support services for people affected by cancer.

All eight state and territory Cancer Councils are separate entities established under a variety of governance arrangements, but all are non-government, not-for-profit organisations with a shared stake in a robust charity sector in Australia. While the Cancer Councils openly compete for cancer-related government contracts, our operational funds are derived entirely from non-government sources.

Responses to consultation paper questions

1. Are there any issues with amending the 2003 definition to replace the ‘dominant purpose’ requirement with the requirement that a charity have an exclusively charitable purpose?

Cancer Council Australia supports in-principle the requirement that a charity has an ‘exclusively’ charitable purpose, particularly in relation to the entity’s core business.

Charity as a dominant purpose is difficult to quantify. There are adequate criteria to establish that an organisation’s core business and purpose are charitable (which we will address in part in response to other questions in the consultation paper). For example, while some charities may engage in arguably entrepreneurial activities, such as the non-profit sale of merchandise, in order to hold charitable status they should be able to demonstrate that such activities are an extension of their charitable purpose.

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

Cancer Council Australia supports the NSW Administrative Tribunal 2003 decision – ‘that a body which enhanced the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution’ – provided such a peak body’s membership and commonality of purpose are consistent with agreed criteria for charitable status, as discussed throughout this submission.

Cancer Council Australia is a good example of this principle. For instance, while we have some direct interface with the public (e.g. our email Infoline, web-based information services etc.), our core business is supporting our members – the eight state and territory Cancer Councils – through coordination and promotion of evidence-based cancer control policy, media, fundraising and other support services as a federated organisation. Our members have a higher level of direct public interface (e.g. community programs, patient accommodation, peer support, volunteer services, interest-free loans etc.), however we should nonetheless retain the same charitable status as we are an extension of their work at the federal level and meet all other criteria for charitable status. We believe this principle should apply to all organisations with a similar structure and which can clearly demonstrate that they meet agreed criteria for defining a charity.

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

Cancer Council Australia sees no reason to clarify these meanings in the context of our core work, in the sense that one in two Australians will be diagnosed with cancer by the age of 85 and it is likely that every adult Australian will know someone with a personal experience of cancer. Therefore it is a given that our work is relevant to a 'sufficient section of the general community' by any reasonable definition; this may therefore be a matter for other organisations with a less extensive brief to discuss.

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

This question is not directly relevant to Cancer Council, as our core work – cancer research, patient support, education, policy development and promotion – is focused on benefits for the broader community rather than for individual family groups.

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?

Not necessarily. Cancer Council Australia supports the definition of 'public benefit' currently articulated in the Charities Bill 2003, i.e. 'being aimed at the universal and common good and having practical utility'. A degree of flexibility may be required to assist the Australian Charities and Not-for-profits Commission (ACNC) in determining how organisations contribute to public benefit, in order to reduce the administrative burden on small not-for-profit organisations who nonetheless meet criteria for the definition of charity.

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?

Not necessarily. Statutory law in Australia should provide an effective framework for defining charity. The challenge for our federated system is to streamline and integrate statutory laws nationally, developed and enforced by a single entity, thus reducing administrative burden on charities and providing greater consistency across the not-for-profit sector.

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

In the context of Pemsel's 'four heads of charity', Cancer Council Australia understands the logic of 'presuming' that heads one and two – the relief of poverty; and the advancement of education – demonstrate that a relevant entity is a charity, provided these 'heads' constitute core organisational business and that all other criteria are met.

It could be argued that the third head – 'the advancement of religion' – is not in itself sufficient grounds to demonstrate charitable status, unless benevolent work is part of a religious organisation's core business. We also empathise with concerns that the output of some religious organisations can be detrimental to the community, notably antisocial and exclusive entities such as cults.

We strongly argue that organisations categorised by the fourth head – 'other purposes beneficial to the community not falling under any of the preceding heads' – whose core business is improving community health and supporting individuals living with illness should be entitled to the same presumption of charity status as those categorised by the first two heads of charity, particularly if they meet criteria underpinned by the Charities Act.

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

The answer to this question will be one of the key challenges of the not-for-profit/charity sector reform agenda. Streamlined legal and governance arrangements and greater transparency and improved disclosure arrangements – which will be a whole-of-government responsibility rather than within the ACNC’s remit – will need to underpin any assistance the ACNC can provide for entities seeking to pass the public benefit test.

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

Cancer Council’s focus is community health and wellbeing. Question 9 is a matter for dedicated religious and educational organisations to address. Our only comment is that we believe community education – such as our core work in educating the public about cancer risk – should be seen as a public benefit in the context of defining charity.

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

In general terms we support the intent to strengthen the provisions, including adoption of ‘exclusive’ instead of ‘dominant’, to help ensure a charity’s activities are for the furtherance of its charitable purpose, which in turn would lead to increased transparency in the sector.

Charitable organisations should be challenged if their incidental work appears out of step with their core charitable purpose. The definition of “exclusively charitable purpose” should be applicable to any significant work done by an entity claiming charity status.

There may, however, be a requirement for some flexibility, provided all work can be shown to further the charity’s purpose. For example, it could be argued that the development of independent, evidence-based cancer control policy does not directly benefit the community unless such policy is adopted by the government agency with a remit for implementation. However, such policy work is still entirely consistent with our organisation’s charitable purpose of seeking to reduce the impact of cancer. In circumstances such as these, independent health policy development and promotion should be defined as an exclusively charitable purpose.

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

Cancer Council Australia supports a strengthening of the requirement that a charity’s ‘activities’ should be in furtherance of its charitable purpose. Further discussion may be required before the sector reaches consensus on how the role of activities might be more rigorously defined, but greater transparency and rigour would be welcomed.

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?

Cancer Council Australia emphatically supports amending paragraph 8(2), paragraph c, of the Charities Act which lists as a disqualifying activity: ‘attempting to change the law or government policy’.

Seeking to influence government policy is part of the core business of organisations such as Cancer Council Australia, clearly in the furtherance of their charitable purpose. For example,

our organisation has the capacity to collect evidence showing that bowel cancer screening could save up to 30 Australian lives each week. However, we do not have the capacity to run a population-based cancer screening program to save those lives; that function is the role of government. For us to execute our brief to reduce the impact of cancer in Australia, seeking to encourage government to fund initiatives such as bowel cancer screening is a core part of our charitable work.

Organisations that rely on donations and other nongovernment sources of income are best-placed to provide independent advice to government and the community on policy without the restrictions or potential conflicts that come with reliance on government funding. So the capacity for charitable organisations to develop and promote public policies that can be shown to benefit their stakeholder base is fundamental to a robust charity sector.

We therefore urge government to remove paragraph 8(2), paragraph c from the Charities Bill 2003, should it proceed, and to strengthen the Bill by adding that entities should *not* be disqualified from charity status for seeking to change government policy if such policy has relevance to the entity's purpose in promoting public benefit.

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

Cancer Council Australia supports prohibiting charities from directly urging the community to vote for a particular political party or candidate, however further clarification of the Bill might be required to enable charitable organisations to openly commend public policies announced by parties and candidates that are relevant to the organisation's purpose in promoting public benefit. The Bill should also make it clear that charities have the right to criticise and oppose public policies announced by parties and individual candidates on matters of relevance to their charitable purpose.

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

Charities should by definition be legal entities and operate within a legal framework.

Cancer Council Australia supports Point 117, the recommendation of a new regulatory regime that will allow the ACNC to impose penalties as an alternative to deregistering a charity which has engaged in 'inappropriate conduct'. 'Inappropriate conduct' can be a broad and arbitrary term. Some organisations, in the fervent pursuit of their charitable mission, may on occasion be seen to engage in conduct that might be deemed inappropriate. While this is not an issue for Cancer Council, which would not expect to engage in 'inappropriate behaviour' by any measure, deregistering a charity rather than imposing penalties would be an extreme response to activity that might be seen as mischievous but nonetheless less well-intentioned in the context of the charity's brief.

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

Cancer Council Australia supports a definition of 'government body' being *inter alia* an entity that receives direct operational funding from government and/or whose day-to-day operations are subject to decisions made by a government agency.

Charitable organisations should however be able to compete for and deliver government programs on a contract basis; to restrict charities from doing so would in many cases preclude the most capable and cost-effective organisations from undertaking important community work on behalf of government.

16. Is the list of charitable purposes in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 an appropriate list of charitable purposes?

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

Cancer Council Australia supports in-principle the charitable purposes defined in part 3 of the Charities Bill. We particularly welcome 'the advancement of health' as one of the defining purposes of a charity.

We support in-principle the recommended 'disqualifying purpose' in Ruling TR 2011/D2, provided an organisation's involvement in activities thus described can be clearly and independently demonstrated.

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

Ideally, all charities in Australia should be subject to the same definitions, general governance and disclosure requirements and other administrative arrangements. The key to "harmony" is consistency and uniformity of these requirements, a streamlining of arrangements to reduce red tape and an emphasis on consistent core requirements that underpin improved transparency and disclosure.

If a single whole-of-government entity cannot be established under the Bill and through ensuing COAG negotiations, the Commonwealth could show national leadership by developing uniform laws and promoting elements of their adoption by other jurisdictions. As different jurisdictions currently have different requirements (e.g. not all jurisdictions recognise sporting bodies as charitable), a starting point towards achieving greater inter-governmental consistency could be to apply uniform administrative arrangements to those organisations that already meet the criteria for charitable status in all states and territories. A consistent approach across Australia's federation would thus be beneficial in reducing red tape and cross-border inconsistencies, particularly for federated charities.

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

Cancer Council Australia is unable to comment on disaster relief funds.

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

Cancer Council Australia would like to see greater clarity around commercial activities – e.g. recognition that some charities sell merchandise to further their purpose (e.g. our sun protection products) and assurances that this kind of commercial activity, the proceeds of which go towards our charitable work, is clearly permitted under any statutory definition of charity.