



Consultation paper ***A Definition of Charity***

Submission by
Christian Schools Australia Ltd

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1. Introduction

Christian Schools Australia (CSA) is a peak group representing 130 member schools Australia wide with approx 46,000 students and more than 2,000 teaching staff. CSA provides leadership in policy, services and resources for its members, and generally works to advance the cause of Christian schooling.

CSA member schools are geographically, culturally and educationally diverse, while serving predominantly middle to lower socio-economic communities. They operate as locally governed, community-based, not for profit religious organisations.

CSA member schools are closely aligned with one or more Christian churches in their communities. As faith-based schools, our members are overt and particular about the beliefs and values that underpin the schools' culture and practice.

As a direct expression of Christian faith, our member schools have a strong culture of mission and service both at home and overseas. They educate students to be locally and globally active citizens, concerned about the welfare of others and about using their gifts to serve.

CSA member schools have attracted very strong community support as evidenced by their enrolment growth, which has averaged almost 10 percent over the past decade.

Many CSA members were commenced by and remain affiliated with a local church, and draw their enrolments from church families. Others are associated with and supported by members from a number of churches in their local area. In addition, most CSA schools also attract significant enrolments from families who, while not currently attending a Christian church, nonetheless deliberately choose the school because they desire for their children an education that is based upon Christian beliefs and values. This can be expected when the position is accepted that every parent has an inalienable right to choose the type of education they desire for their children.

We have set out below our initial submission to the Consultation Paper on the Definition of Charity. In doing so we reserve the right to provide further analysis and comment either in response to other submissions or more generally. In particular we may wish to make a response to any proposed legislative change which may be recommended following the consultation.

2. The need for a statutory definition of charity

Christian schools remain unconvinced of the need for a statutory definition of charity. Rather than the numerous reviews that have made such a recommendation being the benchmark we take the view that the ultimate decision by Governments not to take such action provides the better guide as to the real need in this area.

It is simplistic to suggest that enshrining existing common law definitions in statute will overcome any perceived confusion or lack of clarity around the meaning of the term. Rather, in our view, it will introduce a potentially greater level of uncertainty and lack of clarity. As 'guidance' around the meaning of these newly legislated terms is developed and inevitably challenged within the judicial system, a whole new body of precedent will doubtless be created around this new material. The result may be

no clearer than at present and without the benefit of generations of common law understanding.

Quite simply we do not believe that the case has been adequately made for the need for such a change in approach to charities, overturning as it does some 400 odd years of legal history and development. Recent High Court decisions in the area have created, in our view, far greater clarity than uncertainty and we believe that there is a clear, stable and reliable body of legal understanding within the current approach.

Comments below in relation to issues canvassed in the Consultation Paper should be read in the light of this overarching concern that the case for change has not been made, and may be flawed.

3. Issues in Defining Charity

The core definition identified in the Paper contains seven elements. Each of these is dealt with in turn below.

Not-for-profit

Subject to the outcomes of the separate consultation in relation to the 'in Australia' special conditions, we see the requirement to be not for profit in the legal sense to be non-contentious and straightforward.

Dominant Purpose

As acknowledged in the Consultation Paper the interaction of purposes and activities remains problematic despite the introduction of a statutory definition. A stated objective of introducing a definition is to improve public understanding of charities. In the light of the confusion around purposes and activities, to change from a dominant purpose to an exclusively charitable purpose approach would, we believe, potentially create potentially greater misunderstanding.

The distinction between activities and purposes is likely to continue to be confused by the general public, with observed activities being misconstrued as purposes. In this context to talk of a charity being required to be *exclusively* charitable may mislead the public into thinking that activities must similarly be exclusively charitable, which is clearly not intended. The retention of the dominant purposes approach conveys this reality far more clearly.

For the public benefit

We remain strongly of the view that none of the three specified 'heads' of charity (relief of poverty, education and religion) should be subject to a public benefit test but retain the existing presumption of a public benefit.

The detailed discussion around a public benefit test in the discussion paper demonstrates the complexity and potential for significant confusion and uncertainty in this area. Within the paper itself exceptions and modifications are already identified that would need to be accommodated. We believe that these are merely the tip of the iceberg. This complexity will directly lead to significant and ongoing compliance and regulatory costs that can only be accommodated by the reduction in benefits and services to those being served.

We understand the argument that such a test may be necessary in a fourth 'catch-all' category of charities, to allow flexibility in dealing with applications for classification within this group. Nonetheless to impose such an onerous and unnecessary requirement on the existing categories, particularly as there has been no significant demonstrated policy failing to date, would be a retrograde decision.

The public benefit test as proposed is also highly subjective. It involves identifying a benefit of the activities and balancing this identified benefit against any detriment or harm. Such a simplistic 'cost/benefit' type approach does not adequately reflect, or respect, the complex nature of charitable work. The approach is implicitly values-laden, potential ideologically-driven and subjective. It raises particular concerns for the provision of education, religion or – in the case of Christian schools – faith-based education.

The community concerns cited to justify the imposition of a public benefit test are, in our view, significantly overstated. In no way do we condone or support the activities of 'cult-like organisations'. The proposed response, through the imposition of a subjective public interest test is, however, disproportionate to the real level of the problems and potentially creates a significant constraint on the exercise of religious freedom in Australia.

Activities to be in furtherance of charitable purposes.

Subject, once again, to other consultations and policy changes in relation to '*Better targeting of not-for-profit tax concession*' the certainty provided by the *Word Investments* decision we believe resolves this issue. Provided that the dominant purpose of an entity is charitable and its activities are in furtherance of that purpose no further test should be required.

Disqualifying purpose/activities

The Consultation Paper itself shifts in its use of terminology from discussing disqualifying purpose in section 2.1 to disqualifying activities in 2.1.5 noting the confusion between the two.

The focus of the discussion is in relation to political activity which we believe to be an important and legitimate activity in furtherance of charitable purposes. Once again we consider that the decision of the High Court in the *Aid/Watch* decision resolves any potential ambiguity in this regard.

In considering the potential for illegal activities to be disqualifying, it is important to evaluate the impact of any such disqualification. The distinction between the action of individuals and an organisational intent also needs to be borne in mind. Further consultation in relation to this issue would be helpful.

Type of Entity

The proposed excluded entities we view to be non-contentious and straightforward.

4. Charitable Purposes

While the approach taken in defining individual 'heads' of charitable purposes is, consistent with the current approach, we would consider it somewhat problematic if this was enshrined in legislation.

Many charitable organisations do not merely undertake activities that fall within a single category of charitable purpose. Indeed the various distinctions made are somewhat artificial, arbitrary and anachronistic.

Christian schools, for example, were established out of a desire by parents and others to see young people grow up in a Christian teaching/learning environment where they could be nurtured in their faith.

The Christian faith is the foundation upon which all aspects of a Christian school are based. Structures and practices, both formal and informal, work together to provide a faith-based community within which learning takes place. In our schools religion is not simply taught as a stand-alone subject, it permeates all that takes place and is lived out in the daily lives of the community of the school.

Indeed the *Melbourne Declaration on Educational Goals for Young Australians* which forms the foundation for school education in Australia and has been agreed to by all Australian Governments acknowledges the breadth of what constitutes education. The goals encompass the 'emotional, mental, spiritual and physical' aspects of education.

Within this context seeking to define Christian, or indeed many other, schools as either involved in the '*advancement of education*' or the '*advancement of religion*' is entirely errant. To do so is to impose what we see as a false dichotomy between *education* and *religious formation*. Provision must be made for organisations that cross a number of the categories lest incentives be created to establish structural arrangements merely to meet rigid legislative requirements.