



## **Submission to the Treasury**

### *A Definition of Charity*

**December 2011**

## **Introduction**

This submission briefly outlines some of the key issues for Australia's not-for-profit sector in response to the release by Treasury of a consultation paper on a definition of charity for the purposes of Commonwealth laws.

This submission has been prepared with the members of the Community Council for Australia (see Attachment 1 listing of CCA members) as well as other key organisations and individuals working in and with the not-for-profit sector.

It is important to note that this submission does not over-ride the policy positions outlined in the individual submissions from CCA members. In endeavouring to provide concise and useful input in response to the Treasury Exposure Draft and Explanatory Memorandum, this submission is divided into the following sub headings:

- Introduction
- About CCA
- Executive Summary and Recommendations
- The Broader Policy Context
- Activities further charitable purpose
- Determining charitable purposes
- A public benefit test
- Putting a statutory definition into practice
- Conclusion

The CCA welcomes this opportunity to comment on the development of a definition of Charity. CCA is willing to engage in further discussion about any of the issues raised in this submission.

## **The Community Council for Australia**

The Community Council for Australia is an independent, non-political member-based organisation dedicated to building thriving communities by enhancing the extraordinary work and effort undertaken within the not-for profit sector in Australia. CCA seeks to change the way governments, communities and the not-for-profit sector relate to one another. This includes establishing a regulatory environment that works for community organisations and not against them.

The mission of CCA is to lead by being an effective voice on common and shared issues affecting the contribution, performance and viability of not-for-profit organisations in Australia through:

- providing thought and action leadership
- influencing and shaping sector policy agendas
- informing, educating, and assisting organisations in the sector to deal with change and build sustainable futures
- working in partnership with the government, the business sector, and the broader Australian community.

## **Executive Summary and Recommendations**

The Community Council for Australia (CCA) welcome the commitment of the Australian Government to introduce a statutory definition of charity, applicable across all Australian laws from 1 July 2013.

The definition of charity is the gateway for not-for-profits to a range of tax concessions, so the introduction of a statutory definition is significant reform.

It signals further commitment by the Australian Government to implement another of the Productivity Commission's recommendations from their 2010 report into the *Contribution of the Not-for-Profit sector*, which made wide-sweeping recommendations for reform for the not-for-profit sector.

The economic contribution of the sector is estimated to be \$43 billion to the economy, employs nearly 900,000 Australians and involves over 4 million volunteers. While the tax concessions provided to the sector are significant and quantified at some \$3 billion a year, their beneficial impact on the capacity of not-for-profit organisations and the economy outweighs the cost, and their work must also be targeted to delivering charitable outcomes.

The current definition of charity is complex, inconsistent between Australian jurisdictions and creates considerable uncertainty for the sector. It is based on over 400 years of common law. To set up a charity, organisations are required to satisfy the Australian Taxation Office (ATO) that they comply with laws first drafted over 400 years ago and which has been continuously refined by case law. If organisations are denied charitable status by the ATO and wish to challenge the ruling, this can end up in the courts at great cost to organisations and government.

Many things have changed in the last 400 years not least the community understanding and expectation by communities and governments of what constitutes a charity. Likewise the broad policy context within which many charities operate has moved to a greater focus on prevention, early intervention, social inclusion, education, innovation and place-based programs and responses.

The sector now works in a broader range of areas than ever before and continues to grow at about 7% per annum. It now works for a range of objectives covering environment, heritage, recreation, animal care, the arts and culture as well as social services, health and wellbeing. The not-for-profit sector which comprises 600,000 entities, including 60,000 charities, has also grown to be one of Australia's largest and most diverse sectors. The vast majority of the sector however is made up of 440,000 small, unincorporated organisations covering a wide range of purposes.

It has been remarked that Charities Act of England and Wales was one of the most widely contested pieces of legislation to pass the English Parliament. CCA commend the Treasury for embarking on this consultation process. The consultation paper encapsulates a broad range of issues requiring resolution before a definition can be reached such as the charitable purposes covered, the role of a potential public benefit test and the administration of a new definition.

Given there have been no less than 15 reviews of the sector since 1995 we call on the government to recognise the considerable contribution made by Parliamentarians, Commissions, government departments and hundreds of sector organisations and individuals. We welcome the Treasury's recognition of the 2001 Charities Definition Inquiry which received over 250 submissions.

The most recent attempt to achieve a statutory definition of charity through Parliament was in 2003, but the then Government's refusal to include advocacy as a charitable purpose led to controversy and the Bill was abandoned. It is important that any new statutory definition is contemporary and relevant and has a clear purpose to create clarity and consistency and reduce compliance costs for not-for-profit organisations working within Australian communities.

## **Recommendations**

### **Broader Policy Context**

1. A new statutory definition of charity must work to improve the regulatory environment for the broad range of not-for-profit organisations seeking to better serve their communities and not impede the work of existing charities.
2. The submissions provided to this consultation process should be made available to the public through the Treasury website in a timely manner, subject to the endorsement of those organisations and individuals providing submissions.

### **Activities further charitable purpose**

3. The main focus of a statutory definition is on the purpose or purposes of an organisation rather than the activities of that organisation. This is the only way to provide a clear definition.
4. Rather than a disqualifying test for illegal activity, the regulator be empowered to remove status from organisations found by the courts to have committed an offence but also be empowered to protect charitable assets and status where appropriate.
5. Certain advocacy activities carried out by organisations do not disqualify them from charitable status, such as participating in public policy debate and working with government to influence public policy.

### **Determining charitable purpose**

6. The statutory definition encompasses a dominant purpose test to give greater flexibility for charities in how they achieve their primary purpose.
7. The new definition considers the role of amateur sport and recreation in addressing social exclusion and community health and wellbeing.
8. Government revisit the Charities Definition Inquiry 2001 which recommended the inclusion of prevention for certain types of charitable purposes in the statutory definition, to reflect contemporary public policy and community expectations. This is particularly important for prevention, early intervention and community wide strategies.

### **A public benefit test?**

9. The regulator is empowered to seek information from organisations to determine their capability and intention to work for the benefit of the public.
10. Public benefit guidance issued by the regulator should include indirect benefits beyond immediate beneficiaries of a charitable purpose.
11. In determining public benefit, the regulator should take into account the sparse Australian geography and the diverse nature of charities in Australia that may represent small groups of people but still provide a public benefit.
12. Clear guidance should apply to peak organisations as well as entities which support and build capacity in the charitable and not-for-profit sector as this has significant public benefits.
13. Native title holders who are members of the same family should not be negatively impacted by a public benefit test that could exclude them from receiving benefits as a charity.

### **Putting a statutory definition into practice**

14. The Australian Charities and Not for Profits Commission (ACNC) have greater independence to regulate the sector holistically including assessing eligibility for tax concessions.
15. There is Commonwealth leadership and commitment to introduce the statutory definition across jurisdictions to reduce compliance costs to the sector and governments.
16. Any compliance costs and burden be minimised and that only those not-for-profits who seek charitable status or associated tax concessions are required to report to the regulator.
17. A reasonable transition period exists for charities to report on their status that is commensurate with capacity and clarity is provided on the impact of a new statutory definition on existing charities.
18. An education campaign is developed to accompany the establishment of a statutory definition of charity.

## **The Broader Policy Context**

It is an unprecedented time of reform in the Australian not-for-profit sector.

The signing of the first National Compact between government and the Australian not-for-profit sector just over 12 months ago heralded a new approach by government to both acknowledge and support the role of not-for-profit organisations in Australia. The establishment of an Office for the Not-for-Profit Sector within the Department of Prime Minister and Cabinet, the establishment of the Not-for-Profit Reform Council and the proposed establishment of the new Australian Charities and Not-for-profits Commission (ACNC) all represent significant positive changes in the relationship between government and the not-for-profit sector, and a commitment to necessary and overdue regulatory reform.

There have been no less than 15 major reviews, reports and inquiries into the regulation and contribution of the sector since 1995 and many of these recommended that a statutory definition of charity be introduced, including the Productivity Commission (201) and the review of Australia's Future Tax System (2010).

It is now acknowledged that promoting and supporting the not-for-profit sector is critical to building a more resilient and productive Australia. The Assistant Treasurer Bill Shorten described the sector as 'punching well below its weight' in terms of its contribution to the economy, to employment, to community life and the realisation of community values in Australia and has committed to a significant regulatory reform agenda.

There are seven major consultation processes underway or about to commence being coordinated by Treasury as part of the regulatory reform agenda, following the announcement in the 2011-12 Budget that the government would establish the one-stop-shop regulator. The consultations relate to specific conditions on charities to access tax concessions, national fundraising reforms and review of governance arrangements. It is critical that these processes align to best streamline and refine the regulation of not-for-profits and charities and that there the timelines for these significant reforms are made clear to the sector so they are best able to respond in a timely and worthwhile manner. A list of these processes is at Attachment 4 (Treasury's Not-For-Profit Newsletter, 21 November 2011).

As noted in the latest Treasury 'Not-for-profit reform newsletter' of 21 November 2011 (Attachment 4), five of the seven processes will be occurring in late 2011 or early 2012. While CCA welcome the opportunity of these significant reforms, the breadth of consultation occurring at one time is significant. We ask for continued understanding about the time pressures on volunteers in charities and not for profits that make short turnaround times challenging as well as clarity and guidance from the Government on the timing, scope and implementation of the reform agenda.

In addition to the regulatory reforms underway, the Federal Government has committed to promoting social enterprise, reducing compliance costs for not-for-profit organisations, encouraging a diversification of financing options to build a more sustainable funding base, establishing less bureaucratic reporting requirements while building community transparency, and working to improve relationships between government and the not-for-profit sector (see Attachments 2 and 3).

These commitments represent a significant change in the way Government and not-for-profits will interact in the future and consequently, how communities will be supported. It is critical that any proposed new regulatory imposition on not-for-profit organisations is informed by this agreed broader policy context.

Likewise, it is important that the consultation process is authentic and constructive. This was a key principle of the National Compact. It is noted that typically the Treasury does not make submissions received through its consultation processes available on their website. To enable the sharing of information and ideas and to strengthen the consultation process we call on the Treasury to publish submission received, with the endorsement of those making submissions, at the time of submission. This has been a great strength of previous inquiries and reviews into the sector. At the very least, the broader commitment of government to strengthening the not-for-profit sector needs to be reflected and CCA recommend:

1. A new statutory definition of charity must work to improve the regulatory environment for the broad range of not-for-profit organisations seeking to better serve their communities and not impede the work of existing charities.
2. The submissions provided to this consultation process are made available to the public through the Treasury website, in a timely manner, with the endorsement of those organisations and individuals providing submissions.

## **Activities further charitable purposes**

Put simply, an organisation's activities will not assist in determining if an entity is a charity or not.

Currently under common law and current tax ruling (2011/D2), both activities and purposes of an organisation are examined in determining if the organisations are charitable. It is also noted in Tax Ruling 2005/22 that activities, functions and character are relevant in determining what a charity is as this is consistent with approaches taken by the courts. This demonstrates the value of a stronger 'purposes' test set out in the statutory definition and will provide greater clarity. CCA recommends that the main focus of a statutory definition be on the purpose or purposes of an organisation rather than the activities of that organisation, given a number of considerations.

'Activities' should not be confused with the characteristics of an organisation that make it a 'not-for-profit'.

CCA notes that the standardised definition of not-for-profit to be applied in determining a statutory definition of charity is the definition of not-for-profit being proposed through the draft 'in Australia' special conditions. While CCA supports the standardisation of the terminology of not-for-profit, we note that the 'in Australia' draft legislation is the subject of a separate consultation process in which CCA has raised a number of significant concerns.

It is also noted that the 'in Australia' legislation has not yet been introduced into the Federal Parliament and that further consultation on the legislation has not taken place. Before any legislation which sets out to curtail the operations of not-for-profits, such as preventing the movement of funds from exempt to non-exempt organisations, the sector must be fully consulted and the significant impact of such legislation is considered. Likewise in determining how an exempt entity's assets and income are treated, there must be allowances for incidental or minor activity that may occur outside an entity's primary purpose.

It is critical there is no ambiguity in describing how the charitable purpose will be tested. The Board of Taxation recommended in 2004 that the Charities Bill 2003 be revised to clarify how activities and purposes will be considered in determining if an entity is a charity (pg1, 3.45). The Explanatory Memorandum to the Charities Bill 2003 is ambiguous in that it indicates the activities will be considered to form an overall view of whether an organisation is charitable.

CCA strongly agrees that if entities conduct activities that generate a profit this should not disqualify them from attaining charitable status, noting that this is what the current law provides for and is confirmed in the latest ATO Tax Ruling 2011/14. This Ruling also articulates that if an entity's sole purpose is charitable and it carries on a business or commercial enterprise to give effect to that charitable purpose, the entity may still have a charitable purpose. It is not necessary for the activities themselves to be intrinsically charitable. The Ruling also indicates that an entity can distribute surpluses to owners or members as long as the distribution of funds to its owners or members is in furtherance of its charitable purposes

It is noted that the targeting of tax concessions to the activities of not-for-profit organisations which furthers their purpose is the subject of a separate consultation process. It is appropriate that any policy intent to target tax concessions to particular activities does not confuse the development of a well-defined and unequivocal statutory definition of charity based on purpose. To focus on activities will not reduce legal disputes and could create new compliance barriers to everyday fundraising activities.

CCA reiterates its call made in its previous submission that where profits of any activity are returned to altruistic purpose or objects of the organisation, the activity be treated as related activity (to the purpose) and relevant taxation concessions should apply.

To apply an activities test in determining the statutory definition of charity could curtail responsible fundraising, reinvestment of retained earnings in support of a charitable purpose, or responsible investment of profits or surplus into commercial activities at critical times such as start-up social enterprises and medium term investment to address falling profitability, etc.

A contemporary definition of charity must reflect the modern-day nature of not-for-profit activities. This includes the burgeoning notion of a 'social economy', whereby market mechanisms are used to achieve social outcomes and the impact of the purchaser-provider relationship between government and the sector through which an increasingly number of human services are provided by the sector.

The Productivity Commission in its 2010 report into the contribution of the sector defined the sector to include organisations involved in the production for the employment of the disadvantaged and those generating revenue to achieve purpose.

Governments, including the Commonwealth, are taking more interest in the role of social enterprises to create employment and training opportunities and have invested heavily in social enterprises through the stimulus funding and partnering to provide new investment vehicles for social enterprises through the Social Enterprises Development and Investment fund (SEDIF) administered by Department of Education, Employment and Workplace Relations (DEEWR).

The Productivity Commission estimated that around half of the sector's income is self-generated (including fees for goods and services), a third is received from government (including contracted government services) and around 10 per cent from philanthropic sources (2010).

Many not-for-profits are looking to commercial activities to support their activities, to invest in their capacity and to generate income to accommodate demand not met by government or philanthropic funding.

According to the Giving Australia study (Department of Families and Community Services 2005), in 2003-2004 over one quarter (29%) of not for profit organisations operated a commercial venture or social enterprise. In the overwhelming majority of cases (87%), the venture was an extension of services that organisations provide as part of their primary purpose and mission. Most organisations (90.1%) reported that they invested profits/surplus back into growing their enterprise, while a small minority donated to external organisations (14.7%), returned profits back to parent or auspice organisation (10.6%), or distributed surplus to members (5.6%).

In regards to the carrying out of illegal activities by organisations or individuals within an organisation CCA does not believe that this should be addressed through the legislation that introduces a statutory definition of charity. The Board of Taxation's 2003 Report on the consultation on the definition of charity recommended that an entity with an unlawful purpose was not entitled to charitable status, and recommends that an instance of unlawful conduct would not disqualify an entity from obtaining or retaining charitable status (recommendation 5.15).

The ACNC could be empowered through separate legislation to remove charitable status where entities as a whole have been prosecuted through the courts and found to have carried out illegal activities, however the regulator should also be empowered to protect charitable assets and the status of organisations where illegal activity has been carried out by individuals within the entity for their own gain, for example an employee misusing charitable assets for their own purposes without the knowledge of the organisation as a whole or an organisation's directors or trustees.

The political activities of an organisation are more contentious. CCA welcomes the Consultation Paper's discussion of this issue and notes that this was a key constraint on progress in the past attempt to pass a statutory definition in the Parliament in 2003. CCA does not support the inclusion of the activity as attempting to change the law or government policy as a disqualifying purpose and supports a refined test which enables this activity where it is to aid an organisation's charitable purpose (paragraph 108-109 of the Consultation Paper).

Advocacy by charities and not-for-profit organisations is a central tenet of a strong democracy. The sector has a central role in advocating for marginalised groups or individuals, and it raises awareness of social issues such as poverty or environmental degradation. Charities and not-for-profits, particularly peak bodies, play all these roles as well as often being an important source of advice to governments on public policy.



The removal of gag clauses from Federal Government contracts in 2008 and the National Compact signed in good faith by government and the sector, represent important first steps in recognising the contribution of not-for-profits to civil society, the right to disagree not only as a democratic right, but recognising the sector as a partner in the policy making process.

CCA recommends:

3. The main focus of a statutory definition is on the purpose or purposes of an organisation rather than the activities of that organisation. This is the only way to provide a clear definition.
4. Rather than a disqualifying test for illegal activity, the regulator be empowered to remove status from organisations found by the courts to have committed an offence but also be empowered to protect charitable assets and status where appropriate.
5. Certain advocacy activities carried out by organisations do not disqualify them from charitable status, such as participating in public policy debate and working with government to influence public policy as many peak bodies do.

## **Determining charitable purposes**

There are two key considerations in determining what a charitable purpose is. The first is requiring charities to have a 'dominant' purpose' and the second is determining the types of purposes that are charitable.

CCA supports the requirement as set out in the Charities Bill 2003 that charities have a dominant charitable purpose, but does not support the development of an 'exclusively charitable' purpose as is the case in some overseas jurisdictions.

A dominant purpose test will be sufficient to determining the core rationale of an entity, while allowing charities to have incidental and ancillary purposes to support their dominant and primary purpose. The application of an exclusive purpose test could also lead to the ineligibility of an organisation to charitable status due to their activities, which are in fact supporting their dominant purpose. Simply put, a dominant purpose test provides greater flexibility and enables the carrying on of activities that support the primary charitable purpose.

It is noted the Consultation Paper has not included sporting, recreational or social purposes as charitable. This is a fairly blunt reading of the current case law and does not necessarily reflect the contemporary role of amateur and recreational sport in building social inclusion and contributing significantly to community health and wellbeing. The exclusion of sport from heads of charity has led to some controversy in the courts and it may be simpler to recognise the advancement of amateur sport as is the case in charity law in England and Wales.

One of the strengths of the Charities Bill 2003 was the wide range of purposes to be expanded from the Pemsel heads to include health, social and community welfare, religion, culture, natural environment. CCA supports the inclusion of a category of charitable status that includes 'other purposes', to provide flexibility in the definition and meet community expectations.

The Paper notes the need to determine if 'advancement' should be clarified to reflect 'prevention'. CCA suggests this being explored further and that the recommendations from the Charities Definition Inquiry be revisited which included the prevention of sickness, poverty, and protection of civil and human rights, to reflect the significant policy focus on early intervention and prevention strategies.

As noted by the Productivity Commission in its report into the contributions of the not-for-profit sector in 2010, there is now universal agreement that prevention is better than cure, and generally costs far less to governments and communities. The adoption of social inclusion, early intervention and prevention strategies is well documented in other places and is now actively being supported by governments themselves.

The Commission noted the difficulty in demonstrating the value of avoiding a cost that would otherwise be imposed by a problem and that prevention tends to attract less donor support. This is compounded by the exclusion of prevention in the common law definition of charity as applied for deductible gift recipient status. Lack of DGR endorsement effectively means that the some parts of the sector are denied the competitive advantage of being able to source critical funding support from philanthropic trusts and corporate sponsorships, impeding their sustainability. The Commission's recommendation that deductibility should be widened to include all tax endorsed charities is in the interests of simplicity and is in keeping with contemporary understanding of what is charitable.

There are several initiatives and frameworks being developed to better measure the impact, rather than the inputs or outputs of programs and activities. The Productivity Commission's recommendation that a Centre for Community Service Effectiveness to promote 'best practice' approaches to evaluation, with an initial focus on the evaluation of government funded community services, should be considered as part of the wider reform framework for the not-for-profit sector.

CCA recommends:

6. The statutory definition encompasses a dominant purpose test to give greater flexibility for charities in how they achieve their primary purpose.
7. The definition considers the role of amateur sport and recreation in addressing social exclusion and community health and wellbeing.
8. Government revisit the Charities Definition Inquiry 2001 which recommended the inclusion of prevention for certain types of charitable purposes in the statutory definition, to reflect contemporary public policy and community expectations. This is particularly important for early intervention and community wide strategies.

## **Is it for the public benefit?**

The ACNC should be empowered to investigate and determine if organisations seeking charitable status are working for the public benefit. Providing benefits for the public (which could also be described as community benefit) as opposed to exclusive private benefits for individuals and their families is a key principle of what constitutes a charity, as developed by case law over time.

In determining if an organisations is charitable through a contemporary purposes test, their public benefit should be presumed as is currently the case, however the regulator should be empowered to seek information from organisations to determine their capability to achieve an organisation's purpose that is beneficial, and that those benefits are provided for the public or a section of the public.

A clear description of how public benefit will be determined by the regulator is an important reform and must work to limit ambiguity and unnecessary compliance. It is noted that the England and Wales *Charities Act 2006* has taken a non-statutory approach in overturning public benefit, which has allowed existing case law to form the basis of methodology to test public benefit.

No less than 19,000 words make up the guidance on public benefit test as applied in England and Wales and there are mixed views on the clarity this has brought to their statutory definition of charity.

Most established charities are already presumed to satisfy public benefit requirements. For example, for the purpose of initial certification, if an entity is a not-for-profit entity, its primary purpose is to undertake charitable works, it has been operating in its present form for at least 12 months and there have not been any substantial complaints about the entity to a government body, then the onus of proof on the organisation is unlikely to provide any real reform in charity regulation.

Charities have a track record in meeting the public benefit so there is no need for undue or burdensome compliance to satisfy the regulator, nor should one apply to those organisations. The information that will be required to be provided to the newly established Commission should satisfy any public benefit requirements. Those organisations should report, however, on the public benefit at re-registration.

It would be expected that organisations who are applying for charitable status for the first time could be required to provide information about how they will achieve their charitable purpose, and should include an outline of how the public or section of the public will benefit from the organisation's purpose.

It is noted that the most controversy that has arisen from the overturning of presumption of public benefit in other jurisdictions has related to charities which charge fees for services. Charities have long charged fees for services and will continue to do so, as has been established by existing case law. Likewise public policy particularly to advance education and provide health care has supported a growing role for charities to provide services, often for fees, to alleviate the demand for government services. It has been noted by the Charities Commission of England and Wales that a high level and non-exclusive criteria around public benefit, including for fee-charging charities, in their Charities Act to clarify general principles should be taken into account when assessing public benefit (Charities Commission, 2005).

In developing guidance on the meaning of 'benefit', it must however include indirect benefits as well as direct benefits, as is the case in New Zealand. Indirect benefits (where the benefit extends beyond the immediate beneficiaries) as well as direct benefits may be taken into account in assessing whether an entity provides sufficient benefit to the public. For example, courts have held that a registration system for medical practitioners provided a public benefit by ensuring that medical practitioners met an appropriate standard and therefore protecting the public by ensuring that those practitioners were adequately qualified.

Peak organisations that have a degree of integration and commonality of purpose with its members should also be considered, while professional associations may not meet this test.

It is interesting that the Consultation Paper is silent on the contents of Tax Ruling 2005/22 which focuses on the exempt status of entities created by entities which are already exempt from income tax. These sorts of entities may provide services to the charitable entity or entities, or raise profits which are put directly back into the charitable purpose. They may be run by the entity directly or may share a board or other governance structures.

One of CCA's member organisations that specialises in supporting and building the IT capacity of not-for-profit organisations recently wrote to the Assistant Treasurer following its unsuccessful application for charitable status:

“We may not be aimed specifically at disadvantaged individuals, the thousands of organisations we support are for the most part carrying out this vital role i.e. we are ‘helping the helpers’ save money that can be diverted to direct service delivery and to become more effective and efficient, as recommended by the recent Productivity Commission report on the not-for-profit sector, which concluded, inter alia, that: ‘NFPs are constrained in improving productivity. Areas of most concern are inadequate governance skills, low uptake of information technology and lack of capacity in evaluation.’ They went on to recommend: ‘A more strategic approach to sector support could assist in developing these intermediary services, including in information technology, which would help small NFPs benefit from economies of scale’ (Productivity Commission 2010 Report, Overview, page 37)” (Letter from Connecting Up to Assistant Treasurer, 8 April 2010).

The statutory definition should provide some clarity around these types of entities as the current principles for determining exempt status is based on a raft of case law, most of it generating from the states. TR 2006/22 highlights the need for a clear public benefit test (or not private benefit) and purposes test which takes in a broader range of charitable purposes. Clarity should also be provided for organisations who may be set up independently of charitable or exempt organisations but whose main focus is to build the capacity of not-for-profit organisations in IT, to assist with mergers, or to build new finance options.

A similar test to that which applies to peak organisations could apply, while noting the need to ensure as set out in TR 2005/22 that control by one entity over another does not equate to the delivery of charitable purposes, nor does control automatically imply the values of one entity apply to another. Given the reliance on the not-for-profit sector to deliver public services, as well as their role in building strong communities, a purpose which strengthens charitable organisations and enables them to fulfil their charitable purpose with more confidence and resources should be considered in a similar way to the purposes test which could apply to peak bodies.

It has recently been noted in the Senate Economics Committee Inquiry into finance for the not-for-profit sector, the role of intermediaries is central to enabling new finance models (such as the establishment of the GoodStart Childcare consortium which took over the ABC Learning Centres) and in developing blended investment models to normalise the market.

Any new definition of charity and public benefit guidance must recognise the sparse geography of Australia and the diversity of the charitable sector in Australia which meets a wide range of purposes. CCA supports the Board of Taxation’s review of the Charities Bill 2003 that a purpose is aimed at the public are that the group that will potentially benefit is not ‘numerically negligible’.

Likewise, native title holders who are members of the same family should not be negatively impacted by any public benefit test that could exclude those entities from receiving benefits as charities, and a provision should be made for this in the legislation. The New Zealand definition provides a useful precedent to take into account family ties.

CCA recommends:

9. The regulator is empowered to seek information from organisations to determine their capability and intention to work for the benefit of the public.
10. Public benefit guidance issued by the regulator should include indirect benefits beyond immediate beneficiaries of a charitable purpose.

11. In determining public benefit, the regulator should take into account the sparse Australian geography and the diverse nature of charities in Australia that may represent small groups of people but still provide a public benefit.
12. Clear guidance should apply to peak organisations as well as entities which support and build capacity in the charitable and not-for-profit sector as this has significant public benefits.
13. Native title holders who are members of the same family should not be negatively impacted by a public benefit test that could exclude them from receiving benefits as a charity.

## **Putting a statutory definition of Charity into practice**

A statutory definition of 'charity' should seek to reduce uncertainty for NFPs applying for charitable status as its primary function.

The Consultation Paper states for the first time that the new Australian Charities and Not-for-profits Commission (ACNC) will determine if an organisation is a charity, but that the ATO will retain a core function and determine if charities meet the special conditions and is entitled to tax concessions. There is no description of the types of tests that comprise these special conditions that will guide the ATO in its decision-making.

This does seem to move away from the Government's commitment to establish the Australian Charities and Not-for-profits Commission as a "one-stop-shop for the support and regulation of the NFP sector" (Assistant Treasurer Media Release 10/5/2011) and create a two-step regulatory process.

The ACNC should have greater independence and determine eligibility for tax concessions based on what becomes the statutory definition. The current role of the ATO as revenue collector and 'gatekeeper' of tax concessions provided to charities creates a conflict of interest in determining who is charitable and who is not. The introduction of a statutory definition should be a real and significant reform and provide a framework for the regulator can apply with independence and confidence as its first priority. This will reduce confusion for the sector and build community confidence as is the policy intent of this reform.

Given the variety of means by which not-for-profits can currently obtain tax concessions (particularly DGR), it would be more administratively efficient for all applications for Commonwealth tax concessions to go through a single portal and a single regulator, that being the ACNC. There may be some administrative reason for the ATO to have a greater role initially in determining tax concessions, however, over time, the endorsement of all not-for-profits for tax concessions should be transferred to the ACNC, as recommended by the Productivity Commission in 2010.

Once a statutory definition is established, there must be Commonwealth leadership to implement it across jurisdictions. As identified by the Productivity Commission there are 40 statutes across Australian jurisdictions which provide tax concessions to charitable organisations and 19 separate agencies that regularly make determinations of charitable status (NRNO 2007). The resulting administrative and compliance burden for organisations operating across jurisdictions is onerous. At the Commonwealth level, the ATO has, in effect, become the de facto 'regulator' in determining which NFPs qualify for charitable and/or DGR status. In other jurisdictions, the processes for determining charitable status vary significantly, with little coordination among agencies, and a high degree of inconsistency and duplication.

The widening of charitable purposes introduced by the *Extension of Charitable Purposes Act 2004* has not been taken up by any state jurisdiction to reform their definition of charity. However the harmonisation of tax concessions arrangements at the jurisdictional level would contribute to a more streamlined system with potential to further reduce administration costs. As noted by the Productivity Commission, this does not imply that the concessional rates need be the same in each jurisdiction as that is a policy decision for the individual jurisdictions, as has occurred in the harmonisation of payroll tax.

A statutory definition of charity which widens the range of charitable purposes should not greatly increase the numbers of charities.

The great majority of not-for-profits are small unincorporated organisations; approximately 440,000 of the sector's 700,000 organisations fall in his category. There are many restrictions on what charities can do, both in terms of the types of work they do, and the ways in which they can operate. In fact no matter how broad the definition of charity, the cost of regular reporting may outweigh the potential benefits provided by receiving charitable tax concessions. Registration for charitable status should be voluntary to minimise compliance particularly for small organisations, unless, of course, organisations are seeking taxation concessions.

It is inevitable that there will be additional requirements for charitable entities to self-assess against the statutory definition. The compliance burden must be minimised to reflect the government commitment to reducing red tape and compliance costs for not-for-profit organisations.

CCA asks the Treasury for greater clarity about the impact of a new definition on entities that currently have charitable status. Given the intention of introduction a statutory definition is to codify existing common law that has been used to interpret the meaning of a charity, based on 400 years of common law, existing charities who have a long history and demonstration of providing public benefits, should remain charities.

CCA notes that the transitional issues for charitable entities should be minimal given the statutory definition will not be introduced until July 2013, but calls for a reasonable transition to any new reporting or compliance arrangements that are commensurate with current capacity as well as taking into consideration the wide range of reforms concerning the regulation and development of the not-for-profit sector.

It will be vital that an education campaign is undertaken to ensure the sector understands any new requirements resulting from a statutory definition of charity. This will be critical to address uncertainty within the sector, legal profession and government. Peak bodies should also be considered as important vehicles as partners with government to provide information to not-for-profit organisations.

CCA recommends:

14. The ACNC have greater independence to regulate the sector including assessing eligibility for tax concessions.
15. There is Commonwealth leadership and commitment to introduce the statutory definition across jurisdictions to reduce compliance costs to the sector and governments.
16. Compliance costs and burden be minimised wherever possible in introducing a statutory definition of charity and that only those not-for-profits who seek charitable status are required to report to the regulator.

17. A reasonable transition period exists for charities to report on their status that is commensurate with capacity and clarity is provided on the impact of a new statutory definition on existing charities.
18. An education campaign is developed to accompany the establishment of a statutory definition of charity.

## **Conclusion**

In embarking on the establishment of a statutory definition of charity, the Government is endeavouring to achieve what previous Governments have been unable to achieve and take the next significant step on the reform journey.

A sensible definition should not open the floodgates for all not-for-profits to be charities, but ensure those concessions are targeted to genuine charitable organisations working for the public benefit through clear guidance of public benefit to charitable organisations and clear powers for the regulator to determine public benefit. It is important that the new definition of charity fits with contemporary public policy and community expectations of charities.

The primary rationale for a statutory definition should be to simplify the registration process for eligible charities and build community confidence in the charitable sector through greater support for charities and streamlined processes. This includes a genuine commitment to streamline definitions of charities used by differing Australian jurisdictions.

In administering a statutory definition of charity, the regulator must have independence to determine charitable status including access to tax concessions, as recommended by the Productivity Commission. This will provide greater certainty to the sector and the community and simplify the registration process for not-for-profit organisations as is the policy intent of the reform agenda.

CCA welcomes this consultation process and is willing to discuss the content of this submission further.

**Attachment 1**



**List of Members of the Community Council for Australia**  
**As at November 2011**

1. Aboriginal Employment Strategy Ltd. – Danny Lester
2. Alcohol and other Drugs Council of Australia – David Templeman
3. Alcohol Tobacco and Other Drugs Association ACT – Carrie Fowlie
4. Associations Forum Pty. Ltd – John Peacock
5. Australian Indigenous Leadership Centre – Rachele Towart
6. Australian Institute of Superannuation Trustees – Fiona Reynolds
7. Australian Major Performing Arts Group – Susan Donnelly (Director)
8. Church Communities Australia – Chris Voll
9. Connecting Up Australia – Doug Jacquier
10. Consumers Health Forum – Carol Bennett
11. Good Beginnings Australia – Jayne Meyer Tucker (Director)
12. GoodStart Childcare Ltd. – Julia Davison
13. HammondCare – Stephen Judd (Director)
14. HETA Inc. – Sue Lea
15. Hillsong Church – George Aghajanian
16. Illawarra Retirement Trust – Nieves Murray
17. Lifeline Australia – Dr Maggie Jamieson
18. Maroba Lodge Ltd. – Viv Allanson
19. Mental Health Council of Australia – Frank Quinlan
20. Mission Australia – Toby Hall (Director)
21. Musica Viva Australia – Mary Jo Capps (Director)
22. Opportunity International Australia – Rob Dunn
23. Philanthropy Australia – Deborah Seifert
24. RSPCA Australia – Heather Neil (Director)
25. Social Ventures Australia – Michael Traill
26. St John Ambulance – Peter LeCornu
27. Surf Life Saving Australia – Brett Williamson (Director)
28. The ANZCA Foundation – Ian Higgins
29. The Benevolent Society – Anne Hollonds
30. The Big Issue – Steven Persson (Director)
31. The Centre for Social Impact – Peter Shergold
32. The Smith Family – Lisa O'Brien (Director)
33. The Ted Noffs Foundation – Wesley Noffs
34. Volunteering Australia Inc. – Cary Pedicini
35. Wesley Mission – Keith Garner (Director)
36. WorkVentures Ltd. – Arsenio Alegre
37. World Vision Australia – Tim Costello (Chair)
38. YMCA Australia – Ron Mell
39. Youth off the Streets – Fr. Chris Riley

## **National Compact Extract: signed by sector organisations and Government 17/3/10**

### **Shared principles of the National Compact**

The Australian Government and the Third Sector will work together according to these principles to achieve their shared vision:

- We believe a strong independent Sector is vital for a fair, inclusive society. We acknowledge and value the immense contribution the Sector and its volunteers make to Australian life.
- We aspire to a relationship between the Government and the Sector based on mutual respect and trust.
- We agree that authentic consultation, constructive advocacy and genuine collaboration between the Sector and the Government will lead to better policies, programs and services for our communities.
- We believe the great diversity within Australia's Third Sector is a significant strength, enabling it to understand and respond to the needs and aspirations of the nation's varied communities, in collaboration with those communities.
- We commit to enduring engagement with marginalised and disadvantaged Australians, in particular, Aboriginal and Torres Strait Islander people and their communities.
- We recognise the value of our multicultural society and we will plan, design and deliver culturally responsive services.
- We share a desire to improve life in Australia through cultural, social, humanitarian, environmental and economic activity. To achieve this, we need to plan, learn and improve together, building on existing strengths and making thoughtful decisions using sound evidence.
- We share a drive to respond to the needs and aspirations of communities through effective, pragmatic use of available resources.
- We recognise concerted effort is needed to develop an innovative, appropriately resourced and sustainable Sector.
- We acknowledge the need to develop measurable outcomes and invest in accountability mechanisms to demonstrate the effectiveness of our joint endeavours.

### **Priorities for action**

Implementing the Compact principles will require coordinated engagement across Government and collaboration with the Sector to develop action plans. These plans will detail how the Compact's eight priorities for action, outlined below, will be met.

1. Document and promote the value and contribution of the Sector.
2. Protect the Sector's right to advocacy irrespective of any funding relationship that might exist.
3. Recognise Sector diversity in consultation processes and Sector development initiatives.
4. Improve information sharing including greater access to publicly funded research and data.
5. Reduce red tape and streamline reporting.
6. Simplify and improve consistency of financial arrangements including across state and federal jurisdictions.
7. Act to improve paid and unpaid workforce issues.
8. Improve funding and procurement processes

## **Attachment 3**

### **Statement of government support for PC recommendations (extract from the Communiqué from the second meeting of the Not-For-Profit Sector Reform Council, 18 May 2011)**

With regards to the Productivity Commission research report, Contributions of the Not for Profit Sector, the Minister advised that the Commonwealth Government has accepted 'in-principle' all but one of the recommendations relating to the Commonwealth. The one recommendation not supported was recommendation 9.5 pertaining to program related social innovation funds. While encouraging greater innovation is critical, the Government believes this should be pursued in other ways.

All Commonwealth Government departments will appoint a Deputy Secretary as advocate with responsibility for supporting their agency's contribution to, and adoption of new processes to reduce red tape, streamline reporting requirements and implement priority actions under the National Compact: working together. The Council strongly supported this decision, as it will provide a strong accountability mechanism for the National Compact and the Government's reform agenda.

<http://www.notforprofit.gov.au/node/140>

## **Attachment 4**

### **Treasury's Not-For-Profit Newsletter – issued 21 November 2011 (page 3)**

#### **What's coming up in the next 12 months?**

##### Public consultations

- Review of NFP governance arrangements – expected late November/early December 2011
- Legislation to establish the ACNC: exposure draft consultation— expected 9 December 2011 to 13 January 2012
- Second exposure draft of 'In-Australia' special conditions and definition of not-for-profit: expected – expected late 2011
- A national approach to fundraising regulation: discussion paper — expected late 2011
- Better targeting of tax concessions: exposure draft — expected January 2012
- Review of corporations limited by guarantee early 2012
- Introducing a statutory definition of 'charity': exposure draft legislation— first half of 2012

##### Treasury and ATO Consultation Forums

- 21 November: Statutory Definition of charity – technical experts forum
- 22 November: ATO's Charities Consultative Committee meeting
- 23 November: ATO's Clubs Consultative Forum
- 13 December: ACNC legislation and governance discussion with the Not-for-profit Sector Reform Council (Canberra)
- 14 December: ACNC legislation and governance forum (Melbourne)
- 15 December: ACNC legislation and governance forum (Canberra)

##### What is due in December 2011?

9 December: Submissions due on: A Definition of Charity consultation paper.