



**Submission on the Treasury consultation paper
A Definition of Charity**

December 2011

Introduction

The Community Housing Federation of Australia (CHFA) is the national advocacy body representing community housing providers in Australia. Our members are charitable organisations who have a keen interest in the new charity definition and its potential impact on their business model and therefore their continuing ability to provide accommodation for disadvantaged households. Our submission is in response to the Treasury Department's consultation paper *A Definition of Charity* which will be referred to as the 'consultation paper' throughout our submission.

Key areas

1. Housing as a head of charity

- Access to safe and secure housing is widely recognised and accepted as a basic human right. The Human Rights and Equal Opportunity Commission has consistently supported policies and programs to ensure that this right is respected. In a speech on the human right to adequate housing, former Australian Human Rights Commissioner Chris Sidoti said,

*Adequate housing is essential for human survival with dignity. Without a right to housing, many other basic human rights will be compromised including the right to family life and privacy, the right to freedom of movement, the right to assembly and association, the right to health and the right to development.*¹

- The right to housing is further supported in international law, most significantly as part of the International Bill of Rights. The Bill of Rights comprises several declarations and covenants including the Universal Declaration of Human Rights; and International Covenant on Economic, Social and Cultural Rights (ICESCR) to which Australia has agreed to be bound. The Declaration sets out an internationally recognised set of standards for all people without qualification. Article 25 of the Declaration states, "Everyone has a right to a standard of living adequate for the health and well-being of himself and his family, including . . . housing"²
- The ICESCR broadly includes the right to an adequate standard of living, the right to an education, the right to fair wages and the right to safe working conditions. More specifically, Article 11 of ICESCR recognises "right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions"³.

¹ *Housing as a Human Right*, Human Rights and Equal Opportunity Commission, address at National Conference on Homelessness, September 1996

² *Housing as a Human Right*

³ See <http://www2.ohchr.org/english/law/cescr.htm>

- Significantly, these covenants also commit signatories to put into action their commitment to the articulated rights. Article 11 goes on to state that States who are party to the ICESCR “will take appropriate steps to ensure the realization of this right”⁴. To assist nations with this task, the United Nations in 1992 appointed a Special Rapporteur to promote the realisation of the right to adequate housing. In his report, the Rapporteur confirmed that States have a responsibility to affirm their obligations through policies and legislation.⁵
- These human rights obligations are often realised through the activities of charitable organisations. For example, the fundamental right to an adequate standard of living is realised through the actions of not-for-profit organisations whose dominant purpose is the relief of poverty. Similarly the basic right to housing is realised through the activities of not-for-profit organisations whose dominant purpose is the provision of safe and secure accommodation.
- There does exist public and legal recognition that organisations whose dominant purpose is the relief of poverty are providing a public benefit and therefore designated as charitable under the first head of charity. CHFA maintains that not for profit organisations that have a dominant purpose of providing safe and secure accommodation should also enjoy the designation as a head of charity and the presumption of public benefit. This would be consistent with the charitable status of other not-for-profit organisations whose dominant purpose(s) seek to realise the obligations of other human rights, such as the right to an adequate standard of living (relief of poverty) and the right to education (furtherance of education).
- Last, the designation of housing as a head of charity is consistent with the intent and direction of other Government policy. The Federal Government has significantly increased its attention to housing and homelessness issues. The Nation Building stimulus package saw the Federal Government invest \$6.2 billion into new social housing, with up to 75% of new dwellings going to not-for-profit housing providers. The White Paper on Homelessness argued for a ‘housing first’ approach, i.e. house people first before providing other wrap around support services. Both of these examples are evidence of the Government’s recognition of housing as a fundamental and basic need and an essential building block for social inclusion and community participation.

2. Charitable purpose

- While CHFA strongly supports the designation of the provision of housing as a separate head of charity, at a minimum housing should be identified as a distinct charitable purpose under the fourth head of charity, i.e. other purposes beneficial to the community not falling under any of the preceding heads.

⁴ <http://www2.ohchr.org/english/law/cescr.htm>

⁵ *Housing as a Human Right*

- Questions 16 and 17 in the consultation paper ask if the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 is an adequate list of appropriate charitable purposes and whether there are other charitable purposes with strong public recognition that should be added to provide further clarity. CHFA supports the inclusion of the provision of not-for-profit housing as an identified purpose, distinct from general inclusion under the provision of 'other purposes beneficial to the community'.
- As stated above under our comments on head of charity, there is broad public recognition and acceptance that housing is a basic need and one that underpins the ability of people to obtain or benefit from other basic needs, such as health, education and well-being. This recognition is also evident in international and human rights law. CHFA believes this accepted recognition warrants housing as a distinct charitable purpose.
- In the overseas examples highlighted in Appendix A of the consultation paper, England and Wales, Scotland and Northern Ireland all list housing as a specific purpose. For example, in England and Wales Charities Act 2006, Section 2 j) and Section 3 (e), articulates relief given by the provision of accommodation to those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage⁶. Scotland and Northern Ireland have similar provisions⁷. According to the consultation paper England argued that purposes included on the list were 'significant enough to warrant a specific place on their own'⁸
- Inclusion of housing as a designated purpose provides greater clarity and certainty for not-for-profit organisations providing housing recognises in charity law their essential contribution to Australian society and would align Australian charity law to be more consistent with international charity legislation.

3. Replace 'dominant purpose' with 'exclusive purpose'

- CHFA supports the retention of the term 'dominant purpose' as it allows for more flexibility when determining an organisation's charitable status. This is particularly relevant in instances where a charitable organisation has multiple purposes, some of which are demonstrably subordinate to the dominant charitable purpose of the organisation and meet the definition of ancillary or incidental. The term 'exclusive' excessively narrows the definition of charitable purpose and removes the provision for ancillary and incidental purposes. CHFA believes this is too restrictive and does not adequately reflect the complex and diverse nature of many charitable organisations.

⁶ *A Definition of Charity*, page 26

⁷ *A Definition of Charity*, pages 29 and 35

⁸ *A Definition of Charity*, page 21

- If the term 'exclusive purpose' is adopted then the definition of charitable purpose must be expanded beyond its current composition. It must identify and reflect the broader range of charitable purposes that currently exist in the charitable sector. The examples from overseas provided in Appendix A of the consultation paper (England and Wales, Scotland and Northern Ireland) all articulate a substantial list of charitable purposes, including the provision of accommodation. This provides more clarity on what constitutes a charitable purpose and provides greater certainty to organisations about their charitable status. Charitable purpose has been discussed in detail in Section 2 of this submission.
- In Section 2.1.2 of the consultation paper, which discussed dominant purpose, the paper cites that confusion can arise when attempting to distinguish between a charity's purpose and its activities. Beyond consideration of charitable purpose when determining an organisation's charitable status, the consultation paper notes that consideration must be given to "whether its activities are in the furtherance of its charitable purpose(s) and whether or not those activities must themselves be intrinsically charitable"⁹. *Word Investments* clarified that activities did not have to be intrinsically charitable as long as they were carried out in the furtherance of the organisation's charitable purpose. Any confusion on this matter has been clarified through the findings of this case. Further, the consultation paper cites that comparable overseas jurisdictions do not include an activities condition; however they require that a charity's activities must be in the furtherance of its charitable purpose¹⁰. CHFA supports a definition similar to these overseas examples that do not include an activities condition other than a requirement that activities must be in the furtherance of an organisation's charitable purpose.

4. Political advocacy

- CHFA believes that activities that attempt to change law or government policy should be allowable and not be considered as disqualifying activities. Often it is precisely these activities that are the most effective mechanism for bringing about reforms that alleviate poverty and bring about systemic change in society.
- Activities that seek change in government policy are often integral to furthering the charitable purpose of an organisation and closely aligned with more direct activities such as the provision of housing. For example, advocating for additional funding to increase the amount of social housing stock for people on low incomes is an activity clearly undertaken to further the charitable purpose of the relief of poverty.
- Activities that advocate a cause should also be allowable activities, where support for the cause is in furtherance of an organisation's charitable purpose, e.g. a campaign calling for an end to homelessness is in accordance with an organisation's charitable purpose of the relief of poverty.

⁹ *A Definition of Charity consultation paper*, the Australian Government the Treasury, October 2011, paragraph 56, page 8.

¹⁰ *A Definition of Charity*, paragraph 98, page 16.

- If political advocacy activities that attempt to change law or government policy are allowable, there is no need for further clarification that the activity needs to fall within the existing heads of charities¹¹. All activities undertaken by a charity must be in accord with a charitable purpose under one of the heads of charity. There is no need to single out political advocacy in legislation. Instead, the ACNC should provide guidance on what activities are allowable under the definition of political advocacy to provide clarity and certainty to organisations.
- CHFA does agree that advocating for a political party and supporting a candidate for political office should be considered disqualifying activities.

5. 'Altruistic' terminology

- The term 'altruistic' was also used in the consultation paper *Better targeting of not for profit tax concessions*. In our submission to that inquiry CHFA noted that the use of 'altruistic' to replace 'charitable' was inappropriate.
- While there is case law on the meaning of 'relief of poverty and case law on the meaning of 'public benefit' under the fourth head of charity, there is no case law that interprets the meaning of 'altruistic'. The only substantive resource on this topic that CHFA is aware of is the PhD of Dr Matthew Turnour *Beyond Charity: Outlines of Jurisprudence for Civil Society*.¹² While the thesis suggests that the concept of altruism is ripe for legal application in a not-for-profit context, he notes that the concept is unmapped:

Altruism has not be theorised . . . in a way that is suitable for jurisprudential development of the common law.

- There is an absence of documentation and evidence of how 'altruism' will be applied to activities in a practical sense and there is a lack of documented theory as to how altruism can be applied in a legal context. It is CHFA's view that the definition of altruistic activity must be well established before any legislation is promulgated that includes this terminology.

¹¹ *A Definition of Charity*, paragraph 108, page 17

¹² Turnour, Matthew *Beyond Charity: Outlines of a Jurisprudence for Civil Society*, p. 187. Available at: http://eprints.qut.edu.au/31742/1/Matthew_Turnour_Thesis.pdf