



Wednesday, 7 December 2011

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: NFPReform@treasury.gov.au

Dear Manager

Response to Consultation Paper: A definition of a charity

Diabetes Australia – Queensland would like to lodge a response to the invitation to comment due Friday 9 December 2011.

Diabetes Australia - Queensland is a health promotion charity assisting people with diabetes in Queensland. Diabetes is the fastest growing disease in Australia with 60 new cases being diagnosed in Queensland each day. There is an urgent need to increase awareness of diabetes and ways it can be prevented. Our organisation represents 50,000 members and 180,000 registrants on the National Diabetes Supply Scheme (NDSS) and is directly involved in delivering a range of initiatives and programs to raise community awareness about the seriousness of diabetes and to prevent people developing type 2 diabetes; detection campaigns to ensure diabetes is diagnosed early; management programs to support people who have diabetes and, supporting research to find a cure for diabetes.

The not-for-profit sector is increasingly competitive, entrepreneurial and seeking closer links to the Government and corporate sectors. Legislation needs to be flexible enough to support this competitive and entrepreneurial need rather than inhibit it. Charities need to be able to work with Governments on policy issues and comment publicly without fear of sanction (formal or informal). The legislative framework needs to complement the community services delivered by this sector and needs to avoid implementation of bureaucratic burden i.e. via standard on reporting that may be onerous on smaller and specific purpose NFP's.

The attachment provides our response to questions we believe applicable to our organisation and the community in which we serve and where possible we have cited examples to illustrate our position.

Thank you for the opportunity to participate in the consultative process and forward our views in relation to the statutory definition of a charity.

Sincerely

A handwritten signature in blue ink, appearing to read "M Clatworthy".

Michele Clatworthy
Chief Financial Officer

Responses to Consultation Questions

Question No.	Question and Answer
1.	<p data-bbox="347 510 1460 645">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?</p> <p data-bbox="347 678 1460 880">We are of the opinion that replacing the 'dominant purpose' requirement with an exclusively charitable purpose will adversely affect charities. Every charity needs to have the flexibility to conduct minor or ancillary activities from time to time which are not, strictly speaking, charitable, but assist the achievement of the dominant charitable purpose. Such minor activities should not jeopardise the entire charity's endorsement.</p> <p data-bbox="347 913 1460 981">Requiring charities to monitor such minor activities to avoid jeopardising the entire charity's endorsement could also, in itself, be a costly exercise.</p> <p data-bbox="347 1014 1460 1149">Further, with the very real current problem of donor fatigue, charities are nowadays required to be innovative and entrepreneurial in their fundraising activities. They, therefore, need the flexibility to be able to conduct these minor, non-charitable but ancillary, activities from time to time.</p> <p data-bbox="347 1182 1460 1451">For example, Diabetes Australia – Queensland (DAQ) may have been donated some land by a donor. DAQ receives professional advice that subdividing that land and selling off the subdivided lots will create a greater financial return to DAQ than merely selling the land in its consolidated form. The activity of subdividing land is not, in itself, charitable. However, in this instance, it will generate more income, which will assist DAQ in achieving its dominant purpose of assisting people suffering from diabetes. DAQ should be permitted to carry out this one off subdivision without endangering its endorsement as a charity.</p> <p data-bbox="347 1485 1460 1686">To a large extent charities rely on donations to deliver their services but on occasion donations may come with conditions. In meeting those conditions it may require activities that could endanger e.g. DAQ's endorsement status as a charity. This may result in DAQ being in the position of having to refuse donations that may be in themselves deemed not to be charitable activities which in turn puts at risk DAQ's ability to achieve its dominant purpose.</p>
2.	<p data-bbox="347 1792 1460 1904">Does the decision by the New South Wales Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification required?</p> <p data-bbox="347 1960 1460 2027">We agree with the recommendation that additional clarification is required on when a peak body can be a charity. There are many peak bodies in Australia which need</p>

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	<p>to be charitable to survive and the lack of clarity could easily cause problems and uncertainty in this regard.</p> <p>Peak bodies assist charities in various fashions by providing different services. Thus the existing NSW Administrative Tribunal decision does not provide sufficient direction as to whether all such services being provided by peak bodies are charitable. (This could be exacerbated by introducing an 'exclusive charitable purpose' requirement.) The more guidance which is provided, the less likely it is that a peak body will need to litigate to receive satisfactory clarification.</p> <p>DAQ is a member of a peak body, which is Diabetes Australia. Diabetes Australia is a national federated body comprising state and territory organisations (of which DAQ is one) supporting people with diabetes and those professional and research bodies particularly concerned with the treatment and prevention of diabetes. Many charities are part of a federated structure, which is inevitable in a country with not only a federal jurisdiction, but also eight other state/territory jurisdictions. Many charities need the benefits which arise from being part of a federated structure with a national peak body at the head.</p> <p>If there is uncertainty over whether or not a peak body can be charitable, one of two situations will arise:</p> <ul style="list-style-type: none"> (a) the peak body will no longer be able to exist, meaning that state/territory bodies will have to find additional resources to replace the services once provided by the peak body; or (b) the peak body will have to pay various taxes, which will inevitably be passed onto the state/territory body members in the form of increased membership fees, meaning that the state/territory members will have fewer resources to dedicate to their own charitable activities.
5.	<p>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?</p> <p>Yes, further clarification should be included. The issue of 'public benefit' is an important one, and therefore the more clarification that is provided, the less uncertainty that resource-stretched charities will have to deal with.</p> <p>An example of where there could be confusion surrounding 'public benefit' is where, for instance, a charity provides intangible benefits, such as social, mental or spiritual benefits (please refer to paragraph 74 of the Consultation Paper). DAQ is constantly</p>

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	<p>discovering new information about diabetes. As this new information comes to light, DAQ attempts to address the newly discovered medical, social and mental consequences to people with diabetes, which results in new services being provided to those people with diabetes. DAQ should not need to be confused concerning whether or not such services provide a benefit within the meaning of 'public benefit'. Further, DAQ should not be required to incur additional costs - each time it introduces new services - to determine whether or not those new services provide a benefit within the required meaning.</p>
6.	<p>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?</p> <p>To begin with, guidance material would be necessary as a minimum at the time the Charities Bill becomes law. Common law could then be relied upon going forward to interpret the Bill and the guidance material, providing the necessary flexibility attached to the public benefit test.</p>
10.	<p>Are there any issues with the requirement that the activities of a charity be in furtherance or aid of its charitable purpose?</p> <p>No, there are no issues, so long as charities are permitted to carry on non-charitable activities which are ancillary to their charitable activities (please refer to our discussion under question 1 above). As explained, charities need a reasonable amount of flexibility in the activities they undertake to be able to achieve their charitable purpose both in the short term and in the long term.</p>
11.	<p>Should the role of activities in determining an entity's status as a charity be further clarified in the definition?</p> <p>We see no harm in further clarity being provided. It may be helpful for the clarity to be the subject of some guidance papers, as opposed to in the legislation itself, to avoid being too prescriptive.</p>
12.	<p>Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?</p> <p>The suggested changes are welcome as every charity should be permitted to lobby and seek to influence government in relation to its charitable activities. It is quite foreseeable that a charity would consider it to be in furtherance of its charitable</p>

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	<p>mission to attempt to change the law or government policy in relation to its cause.</p> <p>For example, if a state government was contemplating introducing a law which prohibited people with diabetes from driving; DAQ would – given its charitable purpose of assisting those with diabetes - most certainly wish to lobby against that proposed law.</p>
13.	<p>Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?</p> <p>It is our submission that all charities should generally be party neutral. However, in relation to ‘party political activities’, the proposed legislation or guidance material should provide further clarification. It should clarify that, although a charity should not be engaged in supporting a candidate for political office, or supporting a political party generally, nevertheless, a charity should be permitted to support a candidate’s or political party’s policies or positions on certain issues, insofar as those matters or issues pertain to the charity’s charitable purpose.</p>
14.	<p>Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?</p> <p>We support the introduction of further clarification on this issue.</p> <p>For example, as charities become more innovative or entrepreneurial, it may be necessary for some charities to enter into joint ventures with other partners to carry out, for example, social/translational research (please refer to paragraph 123 of the Consultation Paper). Having legislation or guidance papers which stipulate that such joint ventures do not detract from a charity’s charitable endorsement is most important.</p>
16.	<p>Is the list of charitable purposes in the Charities Bill 2003 and the <i>Extension of Charitable Purposes Act 2004</i> an appropriate list of charitable purposes?</p> <p>It is our submission that it would be of assistance to have a longer list of charitable purposes in the Bill, akin to the list found in the <i>Charities Act 2006</i> of England and Wales. A section should also be included which allows some flexibility to add to or subtract from the list of charitable purposes as society’s idea of ‘charity’ changes.</p> <p>This submission is on the proviso that all of the charitable purposes which are currently recognised by common law are not diminished or reduced in any fashion.</p>

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18.	<p data-bbox="347 412 1390 477">What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?</p> <p data-bbox="347 546 1358 645">In an ideal world, all of the State and Territory laws would, without any further scrutiny or criteria, accept as charitable any organisation which is charitable pursuant to the Charities Bill 2003.</p> <p data-bbox="347 680 1434 779">It would be too difficult to change the Charities Bill (as amended in accordance with our responses to other questions in this Consultation Paper) to accommodate any nuances of any existing State or Territory laws.</p> <p data-bbox="347 815 1434 1014">If any changes were made to the Charities Bill 2003 to accommodate the various definitions of 'charity' in State and/or Territory laws, it is most important that any such accommodating changes do not result in existing charities losing their current ATO endorsements. Otherwise, there may be a situation where a charity operating in one state, loses its endorsement because the Charities Bill has been changed to accommodate State charity legislation in another State.</p>
20.	<p data-bbox="347 1084 1442 1115">Are there any other transitional issues with enacting a statutory definition of charity?</p> <p data-bbox="347 1189 866 1220">Some transitional issues are as follows:</p> <ul style="list-style-type: none"> <li data-bbox="395 1256 1337 1355">(a) the need to give existing charities time to restructure themselves (especially in relation to activities) in order to comply with any new legislation; <li data-bbox="395 1391 1449 1520">(b) it is imperative that the introduction of the Charities Bill, in any form, be preceded by an investigation into whether the Bill will have any unintended consequences in relation to existing deductible gift recipient endorsements; and <li data-bbox="395 1556 1433 1659">(c) a reassurance should be given that the intended outcome from the introduction of the Charities Bill does not come at the cost of reducing the charitable services currently being offered to the Australian community.