Executive Council of Australian Jewry Inc.

הועד הפועל של יהודי אוסטרליה

The Representative Organisation of Australian Jewry

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Manager
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PARKES ACT 2600 Email: NFPReform@treasury.gov.au

Dear Manager

Re: Proposed introduction of a statutory definition of 'charity' – submission on behalf of the Australian Jewish community

The Executive Council of Australian Jewry (ECAJ), **the elected representative organisation of the Jewish community in Australia**, presents the following submission in response to the consultation paper recently issued by the Assistant Treasurer, the Hon Bill Shorten MP.

Part 1 – Who we are

The ECAJ is the peak body of Australian Jewry representing at the national level the Jewish communities of each of the States and Territories, as well as other national Jewish organisations. Accordingly, each of the ECAJ's **Constituent** bodies is itself a State or Territory roof body to which the major Jewish organisations of that State or territory are affiliated, including schools, hospitals, welfare organisations, religious institutions and other charitable bodies. Each **Affiliate** body of the ECAJ is itself a Jewish organisation that operates nationally, including those which maintain charitable funds or institutions.

In addition, the ECAJ has a number of **Observer** bodies which do not meet the criteria for a Constituent or Affiliate body but which nonetheless have an interest in the ECAJ's representation of the Australian Jewish community and are entitled to attend and observe proceedings at the ECAJ's general meetings.

The ECAJ appoints the members of the peak governing boards of the Council for Jewish Education in Schools and the Council for Jewish Community Security, both of which are recipients for deductible gifts named expressly in the *Income Tax Assessment Act 1997* in sections 30.25 and 30.105 respectively.

As well as representing the Jewish community to government and to the general public, the ECAJ is a partner of other ethnic communities and other faith communities in Australia with which it engages in regular dialogue. It also participates in Human Rights consultations hosted by the Department of Foreign Affairs and the Department of the Attorney-General and the community consultations on Australia's Humanitarian Program conducted by the Minister for Immigration and Citizenship.

The ECAJ also represents the Australian Jewish community internationally, most notably at the World Jewish Congress to which diaspora Jewish communities all over the world are affiliated. A summary of the ECAJ's representative roles follows.

The **ECAJ's** Constituents are:

- The Jewish Community Council of Victoria Inc.
- The New South Wales Jewish Board of Deputies
- The Jewish Community Council of Western Australia Inc.
- The Queensland Jewish Board of Deputies
- The Jewish Community Council of South Australia
- The Hobart Hebrew Congregation Inc.
- The ACT Jewish Community Inc.

The **ECAJ's** Affiliates are:

- The Australasian Union of Jewish Students
- The Union for Progressive Judaism
- Australian Federation of WIZO (Women's International Zionist Organisation)
- The Federation of Australian JewishCare
- Maccabi Australia Incorporated
- National Council of Jewish Women of Australia Limited
- B'nai B'rith Australia/New Zealand
- The Jewish National Fund of Australia Inc.
- Council of Orthodox Synagogues of Australia

The **ECAJ's** Observer Organisations are:

- Council of Progressive Rabbis
- Federation of Australian Jewish Ex-Service Associations
- The New Zealand Jewish Council
- The Zionist Federation of Australia

The **ECAJ** is a partner in:

- The Australian National Dialogue of Christians, Muslims and Jews (with the National Council of Churches in Australia and the Australian Federation of Islamic Councils). Together, we co-ordinated the Journey of Promise
- The Australian Partnership of Ethnic and Religious Organisations (convened by the Federation of Ethnic Communities Councils of Australia)
- The Uniting Church in Australia / ECAJ National Dialogue
- The Conversation of the Australian Catholic Bishops Committee and Australian Jewry

- The National Non-Government Organisation Coalition Against Racism
- Faith Communities for Reconciliation
- ... and a number of other Australian-based community alliances.

The **ECAJ** participates in:

- Human Rights consultations hosted by the Department of Foreign Affairs and the Department of the Attorney-General.
- Community consultations on Australia's Humanitarian Program conducted by the Department of Immigration and Citizenship

The **ECAJ** is the Australian Affiliate of:

- The World Jewish Congress
- The Commonwealth Jewish Council
- The Euro-Asian Jewish Congress
- The Conference on Jewish Material Claims Against Germany
- The Memorial Foundation for Jewish Culture

Part 2 – The Consultation Questions

Question 1: Are there any issues with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose?

We would answer 'Yes' to this question. Both the Charities Bill 2003[1] and the relevant Australian Tax Office Tax Ruling, TR 2011/D2[2], define an entity or fund as charitable if, *inter alia,* its dominant purpose is charitable in the technical legal sense. Both documents also define 'dominant purpose' in a way that permits the entity or fund to have other purposes that further or are in aid of, and are ancillary or incidental to, its purposes that are charitable.[3]

Accordingly, there appears to be no difference between the two documents as regards the substance of the purpose requirement for charities. The difference is one of nomenclature. TR 2011/D2 characterises the purpose requirement as a 'sole purpose' requirement rather than as a 'dominant purpose' requirement even though it expressly acknowledges that a charity might properly have a purpose that is 'incidental or ancillary to a charitable purpose if it tends to assist, or naturally goes with, the achievement of the charitable purpose'[4].

TR 2011/D2 uses the expression 'sole purpose' '*because the only purposes a charitable institution can have are charitable purposes or purposes incidental or ancillary to charitable purposes. It also helps avoid misunderstandings that can arise because of different usages*

[1] At section 4.
[2] At paragraph 25.
[3] Charities Bill 2003 at section 6(1); TR 2011/D2 at paragraphs 26 and 27.
[4] At paragraph 27.

(especially in a taxation context) of various terms that have been used by the courts to describe the required purpose.'[5]

Our view is that the use of the expression 'sole purpose' to describe what is, in substance, a dominant purpose requirement which permits non-charitable incidental or ancillary purposes, will be more likely to create than avoid misunderstandings. On the other hand, the exposition of the meaning of 'dominant purpose' in TR 2011/D2 may be useful if it expressly permits incidental or ancillary purposes to the full extent set out in that Tax Ruling.

We agree that the law should strive for clarity and to that end recommend that in any new legislation on the subject:

(i) the expression 'dominant purpose' should be retained;
(ii) the substance of paragraphs 25 to 28 of TR 2011/D2 should be included in the body of the legislation;
(iii) the legislation should thus expressly provide that an entity or fund is not precluded from being a charity only because one or more of its purposes is not charitable, if that purpose is, or those purposes are, incidental or ancillary (including subsidiary, subordinate or concomitant) to a charitable purpose, in accordance with paragraphs 27 to 28, 164 to 168 and end note [27] of TR 2011/D2.

Question 2: 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?

Our view is that further clarification is required, and further elaboration. The range of support services that may be provided to charities should be expanded. Also, the legislation should expressly provide that a body whose dominant purpose is to enhance the effectiveness or viability of charitable organisations by providing them, on a not-for-profit basis, with educational, mentoring, advocacy, fundraising, planning, financial, investment or other support services is itself a charitable institution. This should be one way (albeit not the only way) of establishing the required degree of integration and commonality of purpose between the supporting body and the charity or charities to which the support is provided. The legislation should expressly acknowledge that there is no requirement that the supporting body provide benefits or services directly to the public.

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

We would answer 'Yes' to this question. If there is to be an explicit 'public benefit' test in any proposed legislation, and there may not need to be one, some definition of that expression will be necessary. For the sake of clarity and ease of reference, the definition, including the meaning of 'public', should be explicated in the legislation itself. The core

[5] At paragraph 5.

definition – that an entity or fund is for the public benefit only if it is directed to the benefit of the general community or to a sufficient section of the general community – is unobjectionable provided that the meaning of 'a sufficient section of the general community' is also defined in the legislation.

The Charities Bill 2003 provided that a purpose is not directed to the benefit of a sufficient section of the public if the people to whose benefit it is directed are numerically negligible.[6] We strongly object to any definition of 'a sufficient section of the public' that is based exclusively on numerical criteria. We share the concerns summarized in paragraph 64 of the Consultation Paper.

In addition we are concerned that a definition of 'public' based solely on numerical criteria would exclude organisations which provide benefits such as aged care and education on a not for profit basis to any members of numerically small religious and ethnic communities who need them, especially if those benefits are tailored to meet the specific religious and/or cultural needs of those communities. Any such exclusion would appear to run counter to the government's policies on multiculturalism and social inclusion especially if, applying the same exclusively numerical criteria, the provision of the same kinds of benefits to members of numerically large religious and ethnic communities would satisfy the 'sufficient section of the public' criterion.

The legislation should therefore provide specifically that the benefit need not be for the whole community, and that limiting beneficiaries to any members of a community group, whether large or small in numbers, who need and are in a position to avail themselves of such benefits, is not of itself inconsistent with the required 'public' element. The legislation should expressly declare that the provision of culturally appropriate benefits to any members of numerically small religious and ethnic communities who need them satisfies the 'public' criterion.

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

We make no submission in answer to this question.

Question 5. Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR 2011/D2 or as contained in the Scottish, Ireland and Northern Ireland definitions or in the guidance material of the Charities Commission of England and Wales?

Question 6. Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of public benefit, be preferable on the grounds it provides greater flexibility?

[6] Subsection 7(2).

We would answer 'Yes' to question 5 and 'No' to question 6. It is appropriate that a concept as broad as 'public benefit', if adopted, should have a definition that is sufficiently inclusive and flexible to accommodate existing and evolving community standards as to what constitutes the common good. However, we believe that an appropriately flexible definition can and should be incorporated in the legislation, instead of relying on case law.

In our view the technique adopted by the Charity Commission for England and Wales (that is issuing a written 'guidance' in pursuance of its public benefit objective) is a significantly less satisfactory alternative because such documents tend to be treated as *de facto* legislation by courts and lawyers in any event in the way they are interpreted and applied, but without having had the scrutiny and input of community values of the Parliament.

We believe there is merit in enacting the substance of paragraphs 117 of TR 2011/D2 into law. That is, if there is to be a public benefit requirement, the legislation should specify that:

(i) it consists of two elements: (a) there has to be a 'value or benefit', and (b) the value or benefit has to be for the community or a sufficient section of the community (as to which see our response to Consultation Question 3);
(ii) the public benefit requirement is deemed to have been met in certain types of cases, such as when the purpose is the relief of poverty or otherwise as is specified in the legislation (or in regulations), but must otherwise be demonstrated; and
(iii) the public benefit requirement is deemed not to have been met if the entity or fund is carried on for the private pecuniary profit of any individual or individuals.

The explication of the meaning of 'value or benefit' in paragraphs 118 to 122 of TR 2011/D2 should also be enacted into law. In particular we support a definition of 'value or benefit' that looks to the 'worth, advantage, utility, importance or significance' of the benefit provided. We would oppose the inclusion of a separate 'practical utility' requirement, as proposed in the Charities Bill 2003, as unduly restrictive and potentially confusing.

Finally, and importantly, we would oppose the introduction of any legislative or regulatory provision or guidance that would require an independent school to ensure that people who cannot afford to pay the school's fees have an opportunity to benefit in a way that relates to the school's charitable aims. In effect this would make the provision of subsidies in one form or another mandatory.

Although all of the Jewish day schools in Australia are not-for-profit bodies that continue to provide subsidies for students from disadvantaged families, it would be wrong in our view to make such provision mandatory without regard to each school's financial capacity to provide such benefits from time to time, and without regard to the varying sources of funds available to different schools. Independent schools have an obligation to operate in a financially responsible manner and the government should not impose additional burdens on them that may adversely affect their capacity to do so.

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

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

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

With regard to bodies that have been established for the relief of poverty, the advancement of education or the advancement of religion (whether they are existing charities or entities seeking approval as charities), we are opposed to the introduction of a new requirement that they demonstrate that they are for the public benefit. We support the maintenance of the existing presumption of public benefit for such bodies. There is simply no evidence of widespread abuse of this presumption. In the rare cases when such an abuse is suspected to have occurred, the government already has the power to require the charity in question to demonstrate that its objects are for the public benefit.

Overturning the presumption and requiring such bodies in every case to demonstrate that they are for the public benefit would impose additional compliance costs on such bodies and thus reduce the funds they have available to meet their core purposes. This would be especially onerous for small charitable organizations run by dedicated volunteers who lack the necessary skills or resources to access expert professional services that would enable them to meet the additional compliance burden. Assurances that only some charities may incur some minor initial compliance costs in demonstrating that they are providing a public benefit[7] are, with respect, unconvincing. Self assessment is inherently a less time consuming, and hence less costly, process than satisfying a remote government regulator.

The assistance of the ACNC, assuming that it sees its role as one of supporting charities and not merely monitoring and regulating them, would at best mean that such bodies would avoid incurring only some, but not all, of the additional compliance costs that affected charities would incur as a result of any overturning of the presumption of public benefit. In the absence of evidence of widespread abuse of that presumption, the costs to those bodies (and through them to the community at large) of overturning the presumption would outweigh any benefit.

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

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

[7] See paragraphs 83 and 84 of the Consultation Paper.

We would answer 'Yes' to both questions. We have no difficulty with the current common law position under which both the activities and purposes of an institution need to be considered in determining whether the entity is a charitable institution to ensure that the entity gives effect to its charitable purpose.

However we would oppose any provision such as that contained in the Charities Bill 2003[8] which would require that a charity not engage in activities that do not further, or are not in aid of, its dominant purpose, as this formulation invites misinterpretation. As the High Court recognized in the *Word Investments*[9] decision, and as the government has now accepted, the activities undertaken by an entity need not be intrinsically charitable for the institution to be charitable. This observation is particularly apposite in the case of peak bodies that oversee the activities of associated entities that are themselves incontrovertibly of a charitable nature.

For the sake of clarification, we would therefore propose that the legislation provide specifically that an entity is not precluded from being a charity only because it undertakes activities that are not intrinsically charitable, so long as those activities are in furtherance or in aid of its charitable purpose in the widest sense.[10] This may in substance have the same effect as the formulation proposed in the Charities Bill 2003, but reverses the emphasis.

Question 12. Are there any issues with the suggested changes to the Charities Bill 2003 as outlined [in the Consultation Paper] to allow charities to engage in political activities?

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

We would answer 'No' to both questions, as our community welcomes these proposed changes. We consider it essential for the sake of clarity in the law that the legislation include a definition of 'political activities' as activities that seek to attempt to change the law or government policy, or decisions of governmental authorities. Such a definition would be in accordance with the relevant case law.

We would urge the government to broaden the scope of political activities in which a charitable body is allowed to engage. We would propose a requirement that any political activities engaged in by a charitable body must be predominantly in furtherance or in aid of the body's charitable purpose, but may also include political activities that are in furtherance or in aid of any other charitable purpose that is recognized as such by law.

As to which charitable purposes should be recognized as such by law, we refer you to our response to questions 16 and 17 below. The definition of 'in furtherance or in aid of' should expressly extend to activities that are incidental, ancillary, subsidiary, subordinate or concomitant to, the charitable purpose, in accordance with the case law.

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[8] Subsection 4(1)(c).

[9] *Commissioner of Taxation v Word Investments* [2008] HCA 55 paragraphs [13]-[34].

[10] See our answer to Question 1 above at paragraph numbered (ii).

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

We would answer 'No' to this question. In our view it would also be desirable for the government to publish guidelines for proper governance of different types of legal entities that operate as charitable bodies.

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

We make no submission in answer to this question.

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

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

We would answer 'No' to question 16. In our view the list of charitable purposes recognised in the legislation should be comprehensive enough to give expression to the breadth of social needs that exist in contemporary Australia and assimilate 'new social needs as old ones become obsolete or satisfied'.[11]

This can be achieved by enlarging the list of charitable purposes beyond the categories enumerated in subsection 10(1) of the Charities Bill 2003 and provided for in sections 4, 4A and 5 of the *Extension of Charitable Purposes Act 2004* (Cth) and by making express provision that the list is inclusive and not exhaustive.

The provisions of subsections 2, 3, 4 and 5 of section 2 of the *Charities Act 2006* (England and Wales) most closely reflect the position we would support, although obviously references therein to the legislation of England and Wales would need to be altered so as to refer to the equivalent Australian legislation. The relevant provisions appear to have been replicated in the *Charities Act 2008* (Northern Ireland). The list of charitable purposes expressly recognised in these provisions is comprehensive by current standards, and the legislation is also flexible enough to accommodate additional charitable purposes to meet new social needs that may yet emerge.

By way of contrast, the charitable purposes enumerated in section 38 of the *Charitable Trusts Act 1957*(New Zealand) seem to reflect the standards of a by-gone era and would not

[11] *Aid/Watch Incorporated v. Commissioner of Taxation* [2010] HCA 42 at paragraph 18, citing Lord Wilberforce in *Scottish Burial Reform and Cremation Society v. Glasgow City Corporation* [1967] 3 All ER 215.

express contemporary thinking in Australia as to the kinds of purposes which are considered charitable. In our view this model should be rejected.

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

For the sake of clarity in the law, and consistency of the law applying among Australian citizens living in different States and Territories, we are in favour not only of a harmonized definition of charity but of the relevant law being uniform throughout Australia.

We therefore agree with the approach of describing an entity firstly as a charity before seeking to narrow those charities that are being identified as eligible for a tax concession.

In addition, we would support the inclusion of a provision deeming an entity that is currently recognised as a charity at the State or Territory level as being a charity at the Commonwealth level also.

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

We would support any legislative changes that will help to achieve the aims listed in paragraph 151 of the Consultation Paper.

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

Care needs to be taken to ensure that the enactment of a definition of charity does not impact adversely on existing overseas aid charities.

Consideration also needs to be given to the impact of any changes to the law concerning the definition of a charity upon currently-existing organisations which are deductible gift recipients (DGR's) recognised under the *Income Tax Assessment Act 1997*.

One area that in our view is in urgent need of reform relates to the prohibition against Prescribed Private Funds (PPF) (which are 'pass through' charities) making distributions to public ancillary funds (PAFs). PAFs and PPFs are DGRs classified in **item 2** of the table in section 30-15 (2) of the *Income Tax Assessment Act 1997*, and may only make distributions to other DGRs that are registered in terms of **item 1** of the table (ie which provide benefits directly for authorized charitable purposes and are not 'pass through' funds).

The reason for this appears to be to prevent pass-through funds from dissipating donated funds in administration and operating costs or accumulating the funds and not expending their funds directly for authorized charitable purposes.

Most pass-through charities would be happy to establish a standalone fund to receive donations from other pass-through charities and for the instrument establishing the fund to provide that:

(i) there must be no deductions for any expenditure other than payments to other DGR charities (ie item 1 DGR charities) that will use the funds directly for authorized charitable purposes;

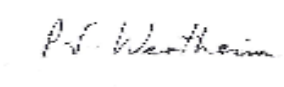
(ii) all donated funds and any income earned in respect of those funds must be distributed in full to those item 1 DGR charities within a limited time period, eg 12 months, failing which they may revert to the Crown which will make the distribution instead of the recipient; and

(iii) pending distribution to an item 1 DGR charity, all donations received from the first pass-through charity must be held in cash or cash-equivalent investments.

We would urge the government to take the opportunity afforded by the current review to allow for the distribution of funds between pass-through charities on these conditions.

We thank you for the opportunity of putting forward this submission.

Yours sincerely



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