



A Definition of Charity

**Submission in response to Consultation Paper released
28 October 2011**

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A Definition of Charity

This submission is in response to the Consultation Paper released by the Assistant Treasurer on 28th October 2011 titled "A Definition of Charity".

Global Interaction is incorporated under the South Australian Associations Incorporation Act 1985.

While Global Interaction commends the Government in seeking to clarify the definition of 'charity' we are concerned that if the proposals contained in the consultation papers proceed they may in fact reduce clarity, could disadvantage mission and other religious organisations compared to other charities and will likely result in significant compliance costs across the charitable and religious sector within Australia.

Who we are

Global Interaction is the cross-cultural mission organisation affiliated with Baptist churches in Australia. In various forms and with several name changes through the years the organisation has been operating continuously since the early 1880's.

Global Interaction is incorporated under the South Australian Associations Incorporation Act 1985. The Board of Global Interaction oversees its governance and is made up of representatives from all states together with board members with particular skills.

What we do

Currently, Global Interaction has approximately 100 staff working in cross-cultural settings in thirteen different countries around the world. There are a further 35 staff in training to work cross-culturally and a support network of thirty five staff employed throughout Australia to provide training, staff development and care, administration support and strategic direction to the organisation.

Global Interaction's staff working in other cultures are involved in working amongst the most disadvantaged people in the world through many different ventures, including:

- Medical work
- HIV prevention training
- Mother and child nutrition training
- Literacy training
- Community support
- Community Leadership development
- Mediation and reconciliation training
- Rehabilitation
- Physiotherapy & Occupational therapy training
- Leadership training

In the course of any week it would be usual for these staff to work with in excess of 1,500 people in providing this training and development. In the case of one country in which operates, Global Interaction staff are some of the few foreign trained staff in that country in their particular field of expertise.

In our view the proposed legislative changes would be significantly detrimental to the organisation, to the ability of staff to continue to work in these cross-cultural settings and would significantly impact those communities overseas where Global Interaction staff work to enhance life, health and spiritual welfare. This is due to what we believe would inevitably be significantly increased costs in the area of compliance.

General Comments on the Consultation Paper

The concerns of Global Interaction to matters raised in the consultation paper relate to the following issues:

- The proposed standardisation of the definition of ‘not-for-profit’ in the ‘In Australia’ special conditions,
- The replacement of ‘dominant’ with ‘exclusive’ in relation to charitable purposes and activities,
- The removal of the presumption of public benefit for religious organisations,
- Lack of clarity in the administration by the ACNC of the public benefit test,
- Lack of clarity in transitional arrangements and requirements for existing charities.

Definition of not-for-profit

In section 2.1.1, the Consultation Paper, *A Definition of Charity* states

“Under the common law meaning of charity, a charity must be a not-for-profit entity”

According to our reading of the consultation paper there is no proposed change to this assertion.

However, the consultation paper, specifically in paragraph 50 states

“The Statutory definition of charity will use the same meaning of not-for-profit as developed by this separate consultation process. The not-for-profit definition applies to all NFP’s not just charities and is therefore being considered as part of a broader consultation process.”

Given that this process of consultation is continuing and no further Exposure Draft has been released since the ‘In Australia’ Exposure Draft of 4 July 2011, it is difficult for Global Interaction to do other than re-iterate our comments regarding the proposed definition of not-for-profit contained in that exposure draft, namely:

In the context of the many reviews and inquiries into the Charitable sector the definition of non-profit, charitable and not-for-profit has been re-visited a number of times.

The additional clarification contained in subsection 995-1(1) **not-for profit entity** means an entity that: (b) *does not distribute its profits or assets to particular entities, including its owners or members, either while it is operating or upon winding up.*

As with most large charitable movements, the Baptist movement in Australia is structure via a number of discrete entities. We are concerned that if this definition was adopted and compliance was a condition of endorsement, Baptist entities, including Global Interaction would be prevented from distributing to or receiving from other Baptist entities. Our understanding of the law as it stands allows a charity to distribute to another charity without infringing the requirement to be not-for-profit. This definition, if adopted, would reverse this position.

Further, in our view this sub-clause uses the ambiguous term “particular entities”, which is not defined in the statute or common law.

This definition, if adopted, would prevent the distribution of such funds between Global Interaction and other Baptist charitable entities.

Responses to Consultation questions

Question 1. Dominant or exclusively charitable purpose

In our view the Charities Bill 2003 section 6 that deals with the issue of **dominant purpose** should be left unchanged. That is a charity should need only to have a dominant purpose that is charitable rather than the purpose(s) be exclusively charitable.

While it is true that paragraph 54 recognises that “*any other purposes, which if viewed in isolation, would not be charitable, could only be incidental or ancillary to the charitable purpose*” it should also be noted that decisions made by the ACNC regarding whether or not activities or purposes are ‘ancillary’ or ‘incidental’ will by nature be subjective and could lead either to controversy, appeal or legal challenge.

Question 2. Peak Bodies

Global Interaction endorses the proposal contained in the consultation paper that the 2003 decision of the NSW Administrative Decisions Tribunal provides clarification of the charitable status of peak bodies provide they “*enhance the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution*”.

Question 3. Sufficient section of the general community

In our view the need for an entity to meet the statutory definition of charity must demonstrate that a purpose is for the benefit of a 'sufficient section of the general community' infers that it will be directed towards a numerically large group of people.

We believe that further clarity is needed regarding this issue particularly for smaller religious groups that, whilst their services are all provided for the general public, can also be seen by some as not providing these services for the public benefit.

Global interaction operates within Australia in several remote indigenous communities where the total population is small.

Again, in our view, decisions made regarding this issue will be subjective and open to appeal or controversy.

Question 4. Family Ties

Global Interaction believes the Charities Bill 2003 should be clarified in this respect to definitely allow beneficiaries with family ties to be able to receive benefits from charities in certain circumstances.

Questions 5 & 6. Public Benefit

Global Interaction agrees that the term 'for the public benefit' needs to be clarified subject to our response regarding the removal of 'presumption of public benefit. We believe that, in this area ruling TR 2011/D2 and the final ruling TR 2011/4 provide sufficient certainty. We are concerned however at the proposed exclusion of the presumption of public benefit for the first three heads of charity.

Question 7. Demonstration of public benefit

We believe there is no case made in the Consultation Paper that the current system to determine 'public benefit' has not operated effectively. Nor is there any detailed and impartial evidence of the overseas examples working well without significant compliance costs to charitable organisations.

There is mention made of the administrative difficulty and the cost to government in regulating and enforcing the law (paragraph 79) however paragraph 83 states "Altering the presumption of public benefit may not increase compliance costs for most charities".

In our view there would likely be significant costs, particularly to religious organisations, where the demonstration of public benefit is not currently essential given the presumption of public benefit in the advancement of religion.

The demonstration of public benefit is again an exceedingly subjective determination and one which, in our view, could lead the ACNC into significant conflict with the sector.

If there are concerns regarding 'renegade' charities, we believe that resourcing the investigation and prosecution of these instances would be preferable than assuming 'mischief' on the part of all religious charities.

Question 8. Role of the ACNC

In our view the ACNC should provide clear guidance regarding the criteria used to determine 'public benefit'. This will reduce ambiguity, conflict and the likelihood of appeals.

The information provided in England and Wales is relatively clear but would, as noted in the paper, require modification for Australian circumstances.

Question 9. Removal of presumption of benefit

Global Interaction are concerned that the 'community concern' noted in paragraph 89 in respect of the 2010 Senate Inquiry 'about the activities of some religious groups' seems to be driving this change to remove the presumption of public benefit.

We recommend that if this is a concern for the Government, the appropriate response is to use the existing criminal laws or make changes to such laws to deter and penalise criminal behaviour.

In our view, the concerns raised by several religious entities regarding significantly increased administrative costs that would be incurred are correct. This would particularly be the case if each of the 1,000 local Baptist congregations and other Baptist entities in Australia had to demonstrate public benefit individually.

Should the presumption of public benefit be overturned, peak bodies such as Global Interaction should be able to play a role in individual congregations or entities meeting the public benefit test.

We are not comforted by the suggestion that the overturning of the presumption of public benefit for the advancement of religion has not resulted in 'any particular difficulties for most religions'. There is no data or evidence included in the consultation paper to support this proposition.

Question 11. Role of activities

As with our response to consultation question 1, we believe that the definition for activities should refer only to the 'dominant purpose'. In our view this will provide more certainty regarding the role of activities of a charity and whether they are provided in the furtherance of this 'dominant purpose'.

Questions 12 & 13. Political Advocacy and political activity

In our view the area of government regulation of political activities is a vexed issue for government. If there is over-regulation, government is seen as a quasi 'censor' of what commentary may be made by organisations, often representing the most vulnerable in our society or the views of their members on the role of government and on social policy.

We support the England, Wales and Scotland treatment of advocacy as noted in Appendix B to the Consultation paper.

Question 16. List of Charitable purposes

In our view the lists of charitable purposes contained in the Charities Bill 2003 and the Extension of Charitable Purposes Act 2004 are appropriate lists of charitable purposes. In a democratic society like Australia there will most likely always be those advocating for further additions to such a list.

Question 18. Harmonisation of Commonwealth, State & Territory laws

Global Interaction believes that the longer-term goal of harmonising a definition of charity across various levels of government is laudable but that it should not restrain or further delay the various reviews and potential changes in the not-for-profit and charitable sector. We believe that to try harmonise all areas noted in paragraph 138 of the Consultation paper at this time will inevitably impact financially on charities or in terms of service delivery to the vulnerable amongst whom so many charities work.

Question 20. Transitional issues

Global Interaction believes that the transitional issues surrounding the implementation of a statutory definition of charity as noted in the consultation paper are too vague and ill-defined.

In a sector that is only now growing accustomed to dealing with government and regulations we believe there needs to be significant guidance provided by the ACNC to charities during a transitional period so that every opportunity is given for bona-fide charities to comply with the requirements for registration as a charity. As such we believe that formal reviews of charities to determine endorsement should not begin until at least 1 July 2014.

Conclusion

While Global Interaction commend the Government in seeking to clarify the definition of 'charity' we are concerned that if the proposals contained in the consultation papers proceed they may in fact reduce clarity, could disadvantage religious organisations compared to other charities and will likely result in significant compliance costs across the religious sector within Australia.

Recommendations

- (a) In our view the definition of charity relies on an as yet undecided definition of not-for-profit which will be further discussed in the second release of the 'In Australia' Exposure Draft. Therefore the process of this consultation regarding the provision of a statutory definition of charity should be suspended until the progress is made an agreed regarding the definition of not-for-profit.
- (b) In our view the Charities Bill 2003 section 6 should be left unchanged regarding the issue of dominant purpose.
- (c) We endorse the proposal regarding the clarification of the charitable status of peak bodies.
- (d) We believe further clarity needs to be given to the following:
 - a. "sufficient section of the general community",
 - b. "for the public benefit",
 - c. The role of activities,
 - d. Transitional issues".
- (e) In our view the current system to determine 'public benefit' should be retained as there is insufficient evidence provided that it has not worked effectively.
- (f) In our view if our recommendation (e) above is not followed, then the role of the ACNC needs to include giving clear guidance regarding the criteria they will use to determine 'public benefit' well in advance of the tests taking place.
- (g) In our view the proposal to remove the presumption of benefit of religious organisations is based on the perceived mischief of a few and the presumption of benefit should not be removed. This removal would also incur very significant administrative costs for all major faith based denominations particularly if each entity was required to prove 'public benefit' on an individual basis.
- (h) In our view the attempt to completely harmonise all related legislation from federal, state and territory legislatures will delay unnecessarily this and other current consultations within the not-for-profit and charitable sector. This will lead to a continuation of the administrative burden and increase the current high level of uncertainty within the sector.