

Thursday, 8 December 2011
12 Kislev, 5772

Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Manager

A definition of charity – consultation paper October 2011

The purpose of this letter is to provide our comments on the questions raised in the Treasury Consultation Paper 'A definition of charity' issued in October 2011 (**Consultation Paper**).

We support a common statutory definition of 'charity' for Commonwealth, State and Territory laws and we hope that our comments will assist in its development. We appreciate the hard work Treasury has gone to in preparing the Consultation Paper, especially the research into overseas jurisdictions, and we value the opportunity to participate in the consultation process.

Jewish Communal Appeal

The Jewish Communal Appeal (**JCA**) is the fundraiser, planner and facilitator for the New South Wales and ACT Jewish Communities.

Established in 1967, the JCA founders instituted a single unified fundraising appeal with an allocation process to ensure an equitable distribution of funds raised based on communal needs. JCA also incorporates a communal planning process as part of its mandate. JCA is governed by and answerable to the presidents of the member organisations which are all not-for-profits.

Day to day operations are managed by paid staff who support and report to committees headed up by volunteer communal leaders.

Today, there are 21 member organisations spanning local community care services, schools, tertiary and continuing education, disability, health, aged care, cultural affairs, advocacy, security and sport.

JCA's annual fundraising campaign on their behalf raises in excess of \$12 million annually.

Ensuring Jewish continuity in partnership with our member organisations...

Academy BJE
- NSW Board of Jewish Education

ACT Jewish Community

Australian Jewish Historical Society

B'nai B'rith

COA Sydney

Communal Security

Emanuel School

Fund for Jewish Higher Education

JewishCare

Jewish Folk Centre

Maccabi NSW

Masada College

Moriah College

Mount Sinai College

National Council of Jewish Women

NSW Board of Progressive Jewish Education

NSW Jewish Board of Deputies

Sir Moses Montefiore Jewish Home

Sydney Jewish Museum

The Shalom Institute

Wolper Jewish Hospital

The organisation and its leadership is committed to ensuring that the NSW and ACT community remains one of the most vibrant and robust Jewish communities in the world.

JCA works to engage, educate and support our community so as to strengthen Jewish continuity and to preserve the Jewish legacy for future generations to come.

JCA's member organisations are listed below, organised by the sectors they represent.

Community and Cultural Services	Community Care	Jewish Day Schools
<ul style="list-style-type: none"> • ACT Jewish Community • Australian Jewish Historical Society • B'nai B'rith • Communal Security • Jewish Folk Centre • Maccabi NSW • National Council of Jewish Women NSW • NSW Jewish Board of Deputies • Sydney Jewish Museum 	<ul style="list-style-type: none"> • COA Sydney • JewishCare • Sir Moses Montefiore Home • Wolper Jewish Hospital 	<ul style="list-style-type: none"> • Emanuel School • Masada College • Moriah College • Mount Sinai College
	Adult and Student Services	Education Boards
	<ul style="list-style-type: none"> • The Shalom Institute • Fund for Jewish Higher Education 	<ul style="list-style-type: none"> • NSW Board of Jewish Education: Academy BJE • NSW Board of Progressive Jewish Education

Comments on questions raised in Consultation Paper

Our comments on the questions raised in the Consultation Paper are as follows.

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 consider that:

- 1 The 2003 definition in the Charities Bill¹ containing the dominant purpose requirement should not be replaced with an exclusive purpose requirement.
- 2 The dominant purpose requirement in the Charities Bill is essentially the same as the 'sole purpose' requirement described by the Australian Taxation Office (**ATO**) as representing the current law in taxation ruling TR 2011/4.²
- 3 Any definition of charity should deal expressly with ancillary or incidental purposes.³

¹ Section 4(1)(b) of the Exposure Draft Charities Bill 2003 (**Charities Bill**).

² In this letter we refer to the final ruling TR 2011/4 which is the final version of draft taxation ruling TR 2011/D2 referred to in the Consultation Paper.

³ As the Charities Bill does in s6(1).

- 4 Any definition, and administration of the definition (by the ATO, proposed Australian Charities and Not-for-profits Commission (**ACNC**) or otherwise) should clearly distinguish between 'purposes' and 'activities'.

The dominant purpose test contained in the Charities Bill expressly deals with ancillary and incidental purposes and provides that the dominant purpose requirement will be satisfied if the charity has other purposes that further or are in aid of, and are ancillary or incidental to, its purposes that are charitable.⁴ That is, any such purposes cannot be independent, non-charitable purposes.

We consider that this test does not differ from the current law as interpreted by the ATO in paragraphs 26 – 29 of TR 2011/4. The key issue, in both TR 2011/4 and the Charities Bill, is that a charity cannot have an independent, non-charitable purpose, regardless of how minor that purpose may be.⁵

Accordingly, we consider that a dominant purpose requirement, with provisions dealing expressly with incidental or ancillary purposes, will be the most appropriate definition.

We also consider that any definition, and administration of that definition, must clearly distinguish between purposes and activities. Case law since 2003 demonstrates the importance of this distinction.⁶ We agree with paragraph 56 of the Consultation Paper that an area of confusion in defining charity is the difference between a charity's purpose and a charity's activities. We consider that the Government should ensure that any such confusion is not contained in any definition of charity.

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?

We consider that:

- 1 Any purpose test should include peak bodies or similar bodies as charities where their dominant purpose is charitable, whether or not they provide services directly to the public.
- 2 Any purpose test should include any other bodies that provide services to charities where their dominant purpose is charitable, whether or not they provide services directly to the public.
- 3 The non-profit principle should not be breached merely because a charity may provide a benefit to a member that is a charity.

As we consider that activities should not be confused with purposes, we consider that a non-profit body having a dominant charitable purpose should itself be a charity, even if its sole activities relate to supporting other charities.

A peak body may or may not have charities as its members. But if its dominant purpose is to support charities, then it too should be a charity. It could support those charities in many different ways (eg provide consulting services, marketing support, provide efficiencies in joint activities, and lobbying on behalf of the charities). What any test should relate to is the purpose, and the activities being in furtherance of the

⁴ Section 6(1)(b) Charities Bill.

⁵ Paragraphs 26 and 29 of TR 2011/4.

⁶ For example, *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 (**Aid/Watch**) and *Commissioner of Taxation v Word Investments* [2008] HCA 55 (**Word Investments**).

purpose.⁷ We consider that charities should be essentially free, subject to certain necessary exceptions, to determine what would be the appropriate activities to implement their charitable purposes.

Similar principles should apply to other bodies established to support charities. For example, a non-profit charitable school may operate on land owned by a related non-profit entity (and so the related non-profit entity would lease the land to the school). If the land holding entity has as its purpose to support and further education, and its activity to fulfil this purpose is to own the land and let the school use it, then it should be a charity, whether or not it charges market rent or lower than market rent.

In relation to peak bodies or other bodies associated with charities, we consider that it is also important that the not-for-profit requirement⁸ is not breached solely because benefits may be provided to members that are themselves charities. The ATO accepts that this would not breach the non-profit requirement,⁹ though recognises that the Corporations Law may impose limits where the charity is a company limited by guarantee.¹⁰ We consider that if a charity provides a benefit to another charity that happens to be a member of the charity, the legislation should expressly provide that that is possible and not a breach of the non-profit principle. We also consider that the Corporations Law should be amended to the extent required to implement this.

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 consider that:

- 1 There should be changes to clarify the meaning of 'public' and 'sufficient section of the general community'.
- 2 The public benefit requirement should not be limited by reference to numbers.¹¹
- 3 'Public benefit' could be defined as a benefit that is not a 'private benefit', and 'private benefit' could be defined as something like 'a benefit provided to persons in their capacity as relatives, employees, members or similar'

We are concerned that a requirement providing that a benefit will not be a public benefit if the people to whose benefit it is directed are 'numerically negligible'¹² could mean that charities with the purpose of providing benefits to what may be small groups of people (eg small rural communities, small schools, persons of a particular religious belief in an area with few persons with that religious belief) will fail a numerical public benefit test.

For example, a charity may have a purpose (ie a 'purpose' and not merely an 'activity') of providing benefits to all persons who suffer from a particular disease at a particular school. If there were only a couple of such persons, the number may be 'numerically negligible', so causing the charity to fail the requirement. If the purpose were not considered to be ancillary or incidental to the charity's otherwise charitable dominant purpose (ie it were an independent purpose, no matter how small), then the entity will

⁷ Subject to certain activities that for public policy reasons should not be permitted (eg party political activities (s8(2)(a) of the Charities Bill) or certain illegal activities (s4(1)(e) Charities Bill)).

⁸ For example, s4(1)(a) of the Charities Bill.

⁹ Paragraph 243 of TR 2011/4.

¹⁰ Footnote 188 of TR 2011/4.

¹¹ As in s7(2) of the Charities Bill with the reference to 'numerically negligible'.

¹² Section 7(2) Charities Bill.

not be considered to be a charity. This would be the case even if the benefits were not being provided because of any 'inappropriate' relationship with the beneficiaries.

We consider that the definition of 'public benefit' we are proposing is consistent with the ATO's views in TR 2011/4. It is not the number of persons who are intended to benefit, but rather the placing of inappropriate limits on who can benefit, that should be the focus of any public benefit requirement.¹³

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 have no comments on 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?

We consider that:

- 1 The public benefit requirement should be clarified to ensure that charities that have a purpose of providing benefits to persons who may happen to be a numerically small number are not disadvantaged.
- 2 The principles outlined in TR 2011/4 in relation to inappropriately placing limits on the persons who may benefit should form the basis of the public benefit requirement.¹⁴
- 3 The suggested definition at question 3, point 3 above, or something similar, would be an appropriate way of dealing with this issue.

Please see our discussion under question 3 for our relevant comments.

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?

We consider that:

- 1 The legislation should contain the principles that should be applied.
- 2 As there will be a new definition of 'charity', it would be appropriate to draft it so that its meaning is as clear as possible without having to revert back to the common law.
- 3 Any definition should be flexible enough to cater for changes in society and other developments that may occur after the definition becomes law.
- 4 Any guidance issued by relevant regulators (eg the ACNC) should be clearly based on the legislation and policy expressed in the legislation.

We believe that the legislation itself should form the basis of any public benefit test. Of course the legislation cannot exhaustively cover all possible situations. So guidelines issued by the ACNC would be important in practice, in a similar way to taxation rulings

¹³ See, for example, paragraph 140 of TR 2011/4.

¹⁴ See in particular paragraphs 140 and 144 of TR 2011/4.

issued by the ATO are an important part of the administration of the taxation law. However, just as is the case in the taxation context, Parliament should establish the principles with as much clarity as possible, and then the relevant regulator (the ACNC in the case of charities) should administer those principles in a fair, reasonable and practical manner.

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?

We consider that:

- 1 Unless it can be clearly demonstrated that the current presumption of public benefit is being abused, that any new definition of charity should retain the current presumption.
- 2 Altering the presumption is likely to lead to additional compliance costs without a corresponding benefit.
- 3 There should not be a mandatory requirement that non-profit schools that would otherwise be charities provide assistance to people who cannot afford to pay the school's general fees.

We are not aware of instances where the current presumption that entities within the first three heads of charity¹⁵ are providing a public benefit is being abused. If there is no such abuse, we consider that the current presumption should be retained.

Paragraph 83 of the Discussion Paper states that altering the presumption of public benefit may not increase compliance costs for most charities as they are already required to review their activities and purpose to ensure they remain charitable and to notify relevant government authorities if they are no longer charitable. However, we consider such reviews would currently not be as costly as if the law were changed. Firstly, the self review applies the current law, with the current presumption. Secondly, there will always be a significant difference in the work and so costs involved in a self review as compared to dealing with a regulator. Thirdly, it will be the smaller charities that would most likely be providing benefits to a smaller number of persons who would particularly be faced with increased compliance costs.

Currently, many non profit charitable schools provide support to students and their families who cannot afford their general fees. However, this support will always depend upon the resources available to the particular school. Resources will always be limited, and we consider that it should be left to the schools themselves to determine how best to use those resources. This is particularly the case where the school is operated by a company limited by guarantee, and the Corporations Law imposes penalties on directors in certain circumstances (eg insolvent trading).

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?

We consider that:

¹⁵ Relief of poverty, advancement of religion and advancement of education (paragraph 19 Discussion Paper).

- 1 The ACNC should have a supportive, rather than confrontational, role in dealing with charities.
- 2 This supportive role should include assisting charities in demonstrating any requirements, whether they be the public benefit requirement, non profit requirement or otherwise.
- 3 As indicated above at question 7 point 1, there should not be a change in the presumption.

We believe that it would be very important, in particular in the beginning of the operation of the ACNC and application of the new definition of charity, that the ACNC support charities as much as possible.

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

We consider that:

- 1 There will be an increase in compliance costs, particularly for smaller charities established for the advancement of religion or education, if the presumption of benefit is overturned.
- 2 Any change in the presumption could particularly adversely affect small charities that are for the advancement of religion in rural or other areas where there are few members of that religion.

See our discussion in relation to question 7 above.

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?

We consider that:

- 1 The dominant purpose requirement, with appropriate provisions for ancillary or incidental purposes, should be adopted for the definition of charity.¹⁶
- 2 The list of charitable purposes should be expanded.¹⁷
- 3 On the basis of the dominant purpose requirement and expanded list of charitable purposes, the activities of a charity should be in furtherance or in aid of its charitable purpose.
- 4 Subject to any necessary prohibitions,¹⁸ charities should be free to adopt whatever activities they consider appropriate to achieve their purposes, and such activities need not be intrinsically charitable.

We acknowledge the statement in paragraph 95 of the Discussion Paper that the 'Government has accepted that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as those activities are in furtherance or in aid of its charitable purpose'. We consider that in view of this, there is no need for the definition to include any mandatory provisions about activities, other than they should be in furtherance or in aid of its charitable purpose.¹⁹

¹⁶ See discussion at question 1 above.

¹⁷ See discussion at question 16 below.

¹⁸ For example, party political or certain illegal activities.

¹⁹ Section 4(1)(e) of the Charities Bill currently does this, though expresses it in a negative way.

Such an activities test would, of course, be dependent upon an appropriate definition of 'charitable purpose' and 'dominant purpose'.

It would be useful if the legislation expressly provided that the activities need not be intrinsically charitable.

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

We consider that:

- 1 The role of activities should include the positive requirement that they be in furtherance or in aid of its charitable purpose.
- 2 Certain activities (eg party political activities and certain illegal activities) should be prohibited.
- 3 The Charities Bill should be amended to deal with 'disqualifying activities' rather than 'disqualifying purposes'.²⁰

We believe that it is important for the definition to clearly distinguish between activities and purposes. We understand from the Consultation Paper, particularly paragraphs 99 to 104, that this is the Government's intention. See further our discussion in relation to question 12 below.

Question 12: Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

We consider that:

- 1 The definition should not prohibit an activity that may amount to advocating a political cause.²¹
- 2 The definition should not prohibit an activity that may amount to attempting to change the law or government policy.²²
- 3 On the basis that a 'disqualifying activities' rather than a 'disqualifying purpose' test is introduced, the test should expressly permit otherwise prohibited activities that are ancillary or incidental activities.

If a disqualifying activities test is introduced, this may have the effect of broadening the prohibition. For example, under the current Charities Bill, the activity of supporting a candidate for political office would only be prohibited if that were a purpose, as distinct from an activity.²³ If such support were to be a prohibited activity, it would be important that it did not impact upon a charity's legitimate activities. For example, attempting to change the law (assuming for now that will be a permitted activity provided it is in furtherance of a charitable purpose) may involve supporting one political party's policy over others. The legislation should be drafted so that this would not threaten a charity's charitable status.

Also, at a fundraiser, a charity may invite a politician (eg local member) to speak at the function. Any positive statements made about the politician by the charity at the function should not be a disqualifying activity exposing the charity to penalties.

²⁰ For example, s8 of the Charities Bill would need to be amended.

²¹ Section 8(2)(a) of the Charities Bill would need to be amended.

²² Section 8(2)(c) of the Charities Bill would need to be amended.

²³ Section 8(2)(b) of the Charities Bill.

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

See discussion at question 12 above.

In relation to illegal activities (see paragraphs 115 to 117 of the Discussion Paper) we consider that:

- 1 The legislation should make it clear when the activity is an activity of the charity itself rather than a person associated with the charity.
- 2 The disqualifying activity should only apply if there is an actual conviction, rather than a government agency's assessment of whether certain conduct may constitute a relevant offence.

We support the policy that an inappropriate activity would be one that involves conduct that constitutes a serious offence.²⁴ However, we consider that it would not be appropriate for a charity to lose its charitable status in breach of this requirement unless it were clear that there was a breach by the charity itself rather than an individual associated with the charity, and there was an actual relevant conviction. It should not be for staff at the ACNC to determine what would be conduct that constitutes a serious offence without such a conviction.

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 consider that:

- 1 Charities should be free to determine the structure that best suits their particular circumstances.
- 2 Besides certain prohibited legal forms,²⁵ subject to perhaps further clarity on what is a 'government body', no further clarification is required.

We do not comment on the issues associated with an appropriate definition of what is a 'government body'.

We understand that charities are currently mainly established as trusts, companies limited by guarantee, incorporated associations under State law and unincorporated associations. We believe that it should be left to the particular charities to determine what would be the most appropriate structure for them, taking into account their particular circumstances. We consider that the Government should not prescribe what structure must be used.

Notwithstanding the above, it may be useful for the ACNC to issue publications on the differences between the various structures and their advantages and disadvantages. It may also be appropriate for the ACNC to provide particular support to unincorporated bodies as these are likely to be the smaller charities that may appreciate greater assistance (though inappropriate pressure should not be placed upon them to change their structure).

²⁴ See s4(1)(e) and definition of 'serious offence' in s3 of the Charities Bill.

²⁵ For example, individual, political party, superannuation fund or government body (paragraph 118 Discussion Paper).

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

We have no comments on 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?

We consider that:

- 1 The list of charitable purposes is not an appropriate list of charitable purposes.
- 2 It would be an ideal opportunity for any definition of charity to include an appropriate list that caters for current and future circumstances.

See our discussion below in relation to question 17.

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

We consider that:

- 1 The list could be expanded to include the purposes contained in the *Charities Act 2006* (England and Wales).²⁶
- 2 The list should expressly include the promotion or advancement of amateur sport and the public participation in such sport.

We believe that the introduction of a definition of charity would be an ideal opportunity to have a list of charitable purposes that reflects today’s society and anticipates the future, rather than relying on a 1601 English Act of Parliament as ‘patched’ by the purposes in the *Extension of Charitable Purposes Act 2004*.

It may be the case that many additions to the list would be covered by the fourth head of charitable purpose.²⁷ However, an express statement of these additional purposes would make it clear to all readers of the definition what were today considered to be important charitable purposes. The definition should still contain the charitable purpose of any other purpose beneficial to the community, so that it should be flexible enough to deal with changes over time.

We consider this is particularly important for purposes that may not always be charitable, but now have strong public recognition. For example, in relation to animals, it seems that animal protection is a charitable purpose under the fourth head because it enhances the life of humans.²⁸ We consider that separately listing animal welfare as a charitable purpose would give this a much better foundation.

In relation to the promotion or advancement of amateur sport and the public participation in such sport, the legislation in England and Wales, Scotland and Northern Ireland expressly includes similar purposes as charitable purposes.²⁹ The ATO in TR 2011/4 at paragraphs 262 – 268 demonstrates the complexities in determining whether

²⁶ See Appendix A Consultation Paper.

²⁷ Other purposes beneficial to the community (see paragraph 19 of Consultation Paper).

²⁸ Paragraph 337 and footnote 405 of TR 2011/4.

²⁹ Appendix A to Consultation Paper.

a body involved in the promotion of sport will be a charity. This complexity would be removed if such support would be an express charitable purpose. Also, we consider that such support would have public recognition as charitable, particularly in view of the health benefits and the currently publicised problems with obesity in Australia.

We consider that the list of charitable purposes contained in the *Charities Act 2006* (England and Wales) would have strong public recognition as charitable also in Australia.

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?

We consider that:

- 1 An appropriate definition of charity should be adopted in the Commonwealth legislation.
- 2 Other Commonwealth, State and Territory laws should then adopt that definition.
- 3 Uniformity is an important goal to be achieved.

We consider that because of the work going into the definition of charity, that it should be the one used by all relevant government agencies under other Commonwealth, State and Territory laws. For example, if a charity were registered with the ACNC, then this should be sufficient for it to be accepted as a charity for all other government purposes. This would involve changes to those other laws. While that may be a time consuming task, we believe that will be in the long term benefit for all charities and government agencies, and so ultimately for the Australian community.

This does not mean, for example, that States could not still implement their relevant policies. For example, in relation to duty exemptions for acquisitions by charities, NSW has a 'use' test³⁰, Queensland has a registration and use test³¹, and Victoria has no registration or use test³². The benefit of harmonisation would be that the charity, if registered with the ACNC, would not need to register again in Queensland. However, each of NSW and Queensland would still be free, if they wanted to, to have their own use tests.

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

We have no comments on this question.

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

We consider that:

- 1 Charities endorsed by the ATO as tax concession charities should not need to reapply for registration by ACNC, but should be able to self assess compliance with any new definition of charity.

³⁰ Section 275 *Duties Act* (NSW) 1997.

³¹ Section 414 *Duties Act* (Qld) 2001.

³² Section 45 *Duties Act* (Vic) 2000.

- 2 The ACNC, in reviewing charities and compliance with any new definition, should adopt a supportive, educational role and if there are relevant breaches of the definition (eg a minor purpose that is not a charitable purpose or a minor activity that is not sufficiently in furtherance of its charitable purpose) then the charity should be given an opportunity to rectify any breaches without losing its charitable status.

There is another important issue relevant to us. In relation to distributions by private ancillary funds³³, we consider that:

- 1 The *Income Tax Assessment Act* 1997 (**ITAA 97**) and guidelines for private ancillary funds and public ancillary funds should be amended to allow private ancillary funds to distribute to public ancillary funds.
- 2 Any such distributions would not be able to be accumulated by the public ancillary fund and would need to be fully distributed to a 'doing charity' with deductible gift recipient endorsement under item 1 of the table in s30-15 of the ITAA 97 within an appropriate period (say by 30 June following the year in which the private ancillary fund distributes to the public ancillary fund).

Under the current law, private ancillary funds are not able to distribute to public ancillary funds, as they are not in item 1 of the table in s30-15 of the ITAA 97, but rather are in item 2. We presume this is because private ancillary funds must generally distribute a minimum of 5% of the market value of the fund each year. As public ancillary funds are not 'doing charities', a distribution to them would not necessarily be used by a 'doing charity' (eg if the public ancillary fund accumulated the distribution and only distributed the minimum it is required to distribute).

We support the Government's policy that distributions should be made to 'doing charities' in a timely manner, and that any accumulation by a public ancillary fund would not be appropriate. However, the effect of the current implementation of that policy is that private ancillary funds are not able to utilise the skills and resources of a public ancillary fund.

For example, a private ancillary fund may be required to distribute, say, \$100,000. It may wish to distribute this to charities to support certain medical research. However, it may not know who the most appropriate charities are, whereas a public ancillary fund may have the skills and resources to determine what charities may be the most appropriate recipients of the distribution. If the private ancillary fund could distribute to the public ancillary fund, and then the public ancillary fund could distribute to the appropriate charities, the goals of the private ancillary fund would be best achieved and the distribution would go to the most appropriate charities.

This is particularly relevant as minimum distributions must generally be made by private ancillary funds by 30 June in each year.

JCA is able to pool donations to it. Allocation committees are able to consider the needs of potential recipients, and then, based upon those needs, recommend appropriate distributions.

JCA through this process is well placed to ensure that allocations to recipients are used appropriately. For example, potential recipients provide JCA with audited accounts,

³³ Previously known as prescribed private funds.

management accounts, strategic plans and reports on what they did with funds previously allocated to them by JCA. This ensures a high degree of transparency and accountability.

JCA's ability to evaluate the needs of potential recipients, and the systems that it has in place to ensure transparency and accountability, means that distributions should be used effectively and thereby maximise their potential social good.

JCA is a public ancillary fund under item 2 of the table in s30-15 of the ITAA 97. Accordingly, private ancillary funds are not able to distribute to JCA, and must under the current law distribute to item 1 deductible gift recipients.

Private ancillary funds do not have the time, resources or skills to implement the same processes as practiced by JCA. They may make distributions on an emotional basis (eg wanting to distribute to a particular organisation without appreciating that it may have sufficient resources and another organisation may be more appropriate, or another organisation may have a more appropriate strategy). Also, the private ancillary funds would not be as significant donors as JCA, and so lack the 'bargaining power' that JCA can use to maximise the effectiveness of distributions that it makes.

We consider that the current law which does not allow private ancillary funds to distribute to public ancillary funds means that the maximum potential of distributions to the 'doing charities' is not fully realised.

We appreciate that it would not be appropriate for the public ancillary fund to accumulate any of the distribution from the private ancillary fund. Accordingly, we suggest that the prescribed public fund must distribute 100% of the distribution to it from the private ancillary fund by, say, 30 June in the year following the distribution to it, otherwise there will be a breach of the guidelines by the public ancillary fund with appropriate penalties. This would involve both amending the guidelines for private ancillary funds and public ancillary funds³⁴, and amending item 2 of the table in s30-15 of the ITAA 97.

We would be pleased to elaborate on the above or provide any further information you may like and would also be pleased to meet with you to discuss.

Yours sincerely



Ian Sandler
Chief Executive Officer
Jewish Communal Appeal

³⁴ Currently there are draft guidelines publicly available for public ancillary funds.