

SUBMISSION ON THE STATUTORY DEFINITION OF CHARITY

20 December 2011

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

By email: NFPReform@treasury.gov.au

Dear Mr Legget

The Leukaemia Foundation of Australia is very pleased that the Australian Government is funding the establishment of a new independent statutory agency, the Australian Charities and Not-for-profit Commission to regulate, educate and support the sector throughout Australia and to implement a common reporting framework and provide a public information portal for the Australian community.

We welcome the opportunity to comment on the Consultation Paper - "A definition of charity" released by Treasury in October 2011. We submit comments in relation to some of the consultation questions identified in the consultation paper. Please refer to our comments in the document attached to this letter.

The Leukaemia Foundation is the only national not -profit organisation dedicated to the care and cure of people affected by leukaemia, lymphoma, myeloma and related blood disorders. Our organisation provides a suite of free support services including information, education programs, emotional support, referral to external expert services, accommodation, transport, and practical support including financial assistance. Our staff advocate on behalf of patients and their families to ensure that they have access to the best available treatment and support for their particular cancer or disorder. Through our National Research Program, we fund talented researchers and students with the best ideas to improve blood cancer treatment and to develop novel approaches to improve our understanding of these cancers with a long term view of finding new cures.

The key issues we would like to highlight are:

1. The importance of a clear legislated definition of charity encompassing demonstrable public benefit through charitable activities. Practical explanatory information and guidance from ACNC should support the program.
2. The proposed date for the introduction of the new charity definition is 1 July 2013. We feel that this time frame is too short to enable the implementation of a "new definition" education program and "borderline charities" to undertake any adjustments required to meet

the new definition. The renewal and effectiveness of the Act and new charity definition needs to be considered and debated about every 5 years. We propose a review clause in the legislation to enable review every 5 years after the commencement to ensure continuous improvement.

3. Although not specifically addressed in the proposed definition of a “charity”, we feel that more definition is required around 3rd party fundraisers and their operating guidelines.

We look forward to the outcomes of this consultation process.

Yours sincerely



Mr Peter Cox
Chief Executive Officer
Leukaemia Foundation of Australia

20 December 2011

1. 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?

Exclusively charitable purpose or dominant purpose

The Leukaemia Foundation of Australia does not support replacing the “dominant purpose” requirement with the requirement that a charity have an “exclusively charitable purpose”.

The Leukaemia Foundation believes that replacing the current “dominant purpose” terminology with “exclusively charitable purpose” terminology is at risk of being misunderstood by the sector and other stakeholders. Further, while the legal understanding of the term “exclusively charitable” may be understood to allow non-charitable incidental or ancillary purposes, this would not be understood by the average person and therefore this aspect of the law would be inaccessible.

Under the common law, to be a charity an entity must have a charitable purpose. A charity cannot have both charitable and non-charitable purposes unless the latter are incidental or ancillary purposes. A variety of terminology has been used over the years and in different jurisdictions to capture this issue. The articulation of these principles over time has led to a variety of terminology to capture this concept, for example, that the entity must have an “exclusively”, “main”, “chief”, “dominant”, “primary”, “predominant”, “fundamental”, “leading” or “paramount” charitable purpose or purposes.

The Leukaemia Foundation recommends that the government:
Use the most recent Australian common law articulation. The two most recent cases dealing with charitable purpose in the High Court of Australia were *Word Investments* and *Aid/Watch*.

The benefit of adopting this option is that the phrase “main or predominant or dominant purpose” will be interpreted with reference to the *Word Investments* and *Aid/Watch* decisions and any future decisions of the Court. This will therefore achieve the government’s policy objective of “providing increased certainty and consistency on the meaning 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?

The Leukaemia Foundation recommends that the legislative definition explicitly state that peak bodies can be charities.

Including peak bodies in the statutory definition will serve to clarify the legislative intention that such bodies are eligible to be charities and therefore meet this policy objective.

Question 3: Are any changes required to the *Charities Bill 2003* to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

The Leukaemia Foundation recommends that the legislative wording clarify the meaning of ‘public’ or ‘sufficient section of the general community’ and endorses the recommendations of the Board of Taxation review.

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?

The Leukaemia Foundation recommends that in the context of native title holders, the “section of the public” test not exclude members with familial ties. The New Zealand example provided in the consultation paper warrants consideration.

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?

The Leukaemia Foundation recommends the clarification of the term “for the public benefit”, because of the confusion and uncertainty at common law. The guidance material of the Charities Commission of England warrants consideration.

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?

The Leukaemia Foundation is of the view that a non-statutory approach is preferable for the reasons that it allows for flexibility, certainty and reflects the diversity of the sector.

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?

The Leukaemia Foundation believes that the introduction of a public benefit test would have significant administrative resources and compliance costs implications for the Not for Profit Sector. This burden to the sector would be detrimental.

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?

As discussed above, the Leukaemia Foundation recommends that the presumption of public benefit be maintained. The ACNC roles should be to provide guidance and educative publications to assist organisations in determining whether they are likely to contravene the “disqualifying factors”.

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

No comment provided.

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?

The Leukaemia Foundation believes there are significant issues with the requirement that the activities of a charity be in furtherance of or in aid of its charitable purpose.

Under the common law, a charity can have a non-charitable purpose if the purpose is *ancillary* or *incidental* to the charitable purposes of the entity. As such it may undertake activities in furtherance of the incidental or ancillary purposes.

The Leukaemia Foundation does not recommend that the Bill state that the activities of a charity must 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?

The Leukaemia Foundation believes that the entity must not only be **established** for charitable purposes, it must also **continue to be conducted** for charitable purposes. Further this is an accurate

statement of the common law which appropriately takes into account the activities of an entity in determining whether or not it is for a charitable purpose.

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?

The Leukaemia Foundation recommends that the Bill focus on purpose rather than activity, particularly as a result of *Aid/Watch*.

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

If charities are to be prohibited from advocating a political party or supporting or opposing a candidate for political office, the Leukaemia Foundation recommends that this be expressed in the Bill as a disqualifying purpose rather than a disqualifying activity. There should however be careful consideration as to why this ought to be a disqualifying purpose.

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

The Leukaemia Foundation recommends that the legislative definition of “government body” be drafted so as not to exclude an organisation, for which the Commonwealth, State or Territory government has the power to nominate an individual to the governing board or trusteeship.

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

The Leukaemia Foundation recommends that the government define “government body” so that it does not exclude worthwhile charities which interact with government.

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?

The Leukaemia Foundation takes the view that the list of charitable purposes in the *Charities Bill 2003* and *Extension of Charitable Purposes Act 2004* ought to be extended. It does not include those additional charitable purposes recognised by the common law after 2004.

The following should be included as charitable purposes:

1. The generation by lawful means of public debate regarding a charitable purpose; and

2. The promotion of physical and emotional fitness.

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

The Leukaemia Foundation recommends that the legislature consider including as charitable purposes, a number of the purposes recognised by similar jurisdictions, unless they are considered not to be beneficial to the Australian community.

1. the advancement of citizenship or community development – section 2(2)(e) of the *Charities Act 2006* of England and Wales;
2. the advancement of the arts, culture, heritage or science - section 2(2)(f) of the *Charities Act 2006* of England and Wales;
3. the advancement of public participation in sport - section 2(h) of the *Charities and Trustee Investment (Scotland) Act 2005*;
4. the advancement of human rights, conflict resolution or reconciliation or the promotion of religious or racial harmony or equality and diversity - section 2(2)(h) of the *Charities Act 2006* of England and Wales;
5. the relief of those in need by reason of youth, age, ill-health, disability, financial hardship or other disadvantage - section 2(2)(j) of the *Charities Act 2006* of England and Wales;
6. the advancement of animal welfare - section 2(2)(k) of the *Charities Act 2006* of England and Wales;
7. the promotion of the efficiency of the armed forces, or of the efficiency of the police, fire and rescue services or ambulance services - section 2(2)(l) of the *Charities Act 2006* of England and Wales;
8. the provision of recreational facilities, or the organisation of recreational activities, with the object of improving the conditions of life for the persons for whom the facilities or activities are primarily intended – section 7(2)(i) of the *Charities and Trustee Investment (Scotland) Act 2005*;
9. the advancement of environmental sustainability – section 11(h) of the *Charities Act 2009* (Ireland);

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?

The Leukaemia Foundation commends the government's objective to achieve a harmonisation of the definition of charity at Commonwealth and State and Territory levels.

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

All points raised in section 151 of the consultation paper are very relevant. The Leukaemia Foundation identifies three problems with the present arrangements:

1. Ensuring that the funds raised go to those affected by the disaster as quickly, fairly and effectively as possible.
2. The mismatch between the capacity of charities to meet public expectations of delivery of services in very short time frames.
3. In large scale disasters like the Kinglake bushfires, 2011 Qld floods, charities do not have the capacity to immediately expand and deliver services. The situation is further compounded when the charity and or its members and staff are also a victim of the same disaster.

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

There are transitional issues in enacting a statutory definition of charity as it is currently proposed. The Leukaemia Foundation reiterates Recommendation 17.