

A Definition of Charity

Treasury Consultation Paper –
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A Definition of Charity

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Introduction

Thank you for the opportunity to comment on issues raised in the Treasury Consultation Paper 'A Definition of Charity' (**Consultation Paper**). We provide some general comments in the Introduction and make specific comments in relation to some of the questions below.

We agree that there is a great need for clarity in a statement of charitable purposes, which provides an opportunity to move beyond the constraints of a purpose needing to come within the 'spirit and intendment of the Statute of Elizabeth' as our society has developed both socially and economically from Elizabethan times. A statutory definition of charity should incorporate the principles in recent High Court decisions such as *Federal Commissioner of Taxation v Word Investments Limited* (2008) 236 CLR 204 and *Aid/Watch Incorporated v Federal Commissioner of Taxation* (2010) 77 ATR 195.

We welcome the proposal to introduce a clear statutory definition of charity in the aim of reducing complexity and improving transparency in the application of the law. However, in order for these aims to be truly realised, it is necessary that the Federal government should have a close dialogue with the State and Territory governments to work toward achieving a harmonised definition of charity across all Australian jurisdictions. If harmonisation across all jurisdictions is not achieved, a statutory definition of charity for Commonwealth legislative purposes only will at best have a neutral impact in terms of achieving the above aims and will not overcome current anomalies in the law.

For example, charitable funds that also have deductible gift recipient (**DGR**) status can only distribute to other DGRs that are also charities. For Federal tax concession purposes, public hospitals are not considered to be charities but they have DGR status, and because they are not charities are not able to receive distributions from DGR endorsed charitable funds. In Victoria, charity legislation deems public hospitals with DGR status to be charities for the purpose of enabling them to receive distributions from charitable funds. However, such legislation is not replicated in all jurisdictions, with the effect that some charitable funds are precluded from making distributions to public hospitals in some jurisdictions. There can be great complexity involved in understanding what permissible distributions some charitable funds can make, due to the differences in the definitions of charitable purposes across jurisdictions. Uniformity in the definition of charity across jurisdictions would significantly assist to overcome such problems.

If a statutory definition of charity is to be accepted by the States and Territories, their input into a statutory definition should be obtained at an early stage in the drafting process. A statutory definition of charity has significant impacts for State and Territory laws (such as for payroll tax purposes, fundraising licences, stamp duty concessions, etc).

Legal practitioners in charity law have a clear understanding of charitable purposes as defined by the common law. Therefore, to the extent that a statutory definition of charity will be a restatement of the common law, the legislation should make this clear. To the extent that there is an intention in any instance to depart from established common law meanings, this should also be clearly stated in the legislation. To the

extent that the common law raises some doubt over a particular meaning, a statutory definition of charity should seek to clarify the meaning and lay rest to any doubt.

It is generally accepted that to qualify as a charity, an entity needs to pursue its objectives on a not-for-profit basis. The Commissioner of Taxation, in administering federal tax concessions, has in various rulings set out certain requirements that an entity must satisfy to be accepted as pursuing its purposes on a not-for-profit basis, such as requirements in relation to appropriate winding up clauses in the constituent documents of an entity. In regard to the proposal that the not-for-profit requirement in a statutory definition of charity should adopt the proposed restatement of the not-for-profit definition in the Federal tax legislation, we submit that it would be more appropriate to set out a definition of not-for-profit and any constituent requirements for not-for-profit status in the same legislation that defines charity rather than signposting to the Federal tax legislation definition and requirements.

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Responses to specific consultation questions

Consultation 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 agree that a charity should have clear and solely or exclusively charitable purposes. For the purposes of assessing an entity's entitlement to charitable status, a sole charitable purpose test would make it unnecessary to introduce an additional activity test that would require an analysis of whether an entity is carrying on charitable activities. Provided that an entity is carrying on its activities for the sole purposes of achieving charitable objectives the activities should only be regarded as a means of achieving charitable purposes. Therefore, to the extent that an entity is carrying on activities in furtherance of solely charitable purposes and is applying income toward such ends, and the entity is able to substantiate this through annual reporting, it should not matter what the activities of an entity are (provided that the activities are not disqualifying for moral or policy reasons that should be clearly articulated in the legislation). Where an entity is not acting in furtherance of its charitable purposes, the Australian Charities and Not-for-profits Commission (**ACNC**) should be provided with sufficient regulatory powers to inquire about and take appropriate action to assess such entities' continuing entitlement to charitable registration.

Consultation 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 NSW Administrative Tribunal decision of *Social Ventures Australia Limited v Chief Commissioner of State Revenue* [2008] NSWADT 331 does not provide sufficient clarification of the entitlement of peak bodies to charitable status, as it is a low level administrative decision restricted to its facts. Peak bodies that act in the furtherance of the charitable purposes of their members should be entitled to charitable status where they have sole purposes of furthering the charitable purposes of those entities. It may be necessary to modify any public benefit test in relation to peak bodies. For example, there could be a provision to deem peak bodies to be acting for the public benefit to the extent that they are directly assisting other charitable entities in furtherance of their charitable purposes. Such peak bodies could be monitored via review of their annual information statements to be provided to the ACNC to ensure that they are acting for charitable purposes.

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

An explanation of the meaning of 'public' or 'sufficient section of the community' is desirable, provided that any explanation does not introduce a rule that is too arbitrary and lacks flexibility in its application to particular circumstances. For example, in the income tax legislation one of the criteria to established a DGR endorsed education scholarship fund requires that scholarships be open to a region of at least 200,000 people. In practice, it has been difficult to apply this test to regional and remote areas. A test that considers whether an entity is acting for the benefit of a numerically negligible portion of the community compared with the overall size of the part of the community to whom the purpose is relevant is a good starting point. However, there should be exceptions to this rule for the relief of poverty or other charitable purposes, and any such exceptions should be clearly stated in the legislation.

Consultation 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?

Yes. There should be limits placed on enabling charitable entities to benefit persons based on their personal ties, unless such persons otherwise fall within a class of beneficiaries in relation to the particular charitable purposes of the entity. Any modifications to a general rule should be clearly stated in the legislation or in some other public statement or direction.

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

We submit that the current common law presumption of public benefit should be retained. The ACNC should provide guidance material on the scope of the public benefit test, and be provided with the ability to test an entity regarding how it is acting for the public benefit.

Any public benefit test should not require having to prove practical utility.

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

Please refer to our answer to question 5.

Consultation 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?

Where an entity is carrying on its activities to achieve solely charitable purposes, it will generally be apparent that it is acting for the public benefit, unless an exception to satisfying a public benefit test applies. However, where an entity would satisfy this requirement, but is not presently required to explicitly show 'public benefit', the removal of this presumption will result in additional costs and uncertainty.

Consultation 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?

In exercising its educative role, the ACNC should issue facts sheets, explanatory statements, rulings and advice. In exercising its regulatory role, the ACNC should have sufficient powers to undertake all reasonable enquiries and take appropriate and proportionate action against entities that are not acting in furtherance of their charitable purposes. Any statutory definition of charity should be determined contemporaneously with the issue of what powers should be provided to the ACNC in undertaking its regulatory role.

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

A explanation of how the public benefit test may be satisfied by affected entities would be desirable if the public benefit presumption is removed. In certain not-for-profit sectors (for example, primary and secondary schools that must be registered under State and Territory legislation), additional costs and duplication of reporting obligations could result. Consideration should be given to providing 'class relief' for sectors that comply with State and Territory registration obligations as sufficient 'proof' of public benefit for the purposes of the definition of 'charity'.

Consultation 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?

No. However, the legislation should clarify that any activities that may not on the face of it appear to be intrinsically charitable do not impinge upon the otherwise charitable status of an entity where they are carried on in furtherance of its charitable purposes.

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

No – further clarification should be provided by the ACNC by way of facts sheets, rulings, etc. See also our response to question 10.

Consultation 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?

No – the High Court decision in *Aid/Watch* has significantly clarified the nature and extent of the type of activities that may be undertaken by charities.

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

No – we consider that such activities are not in furtherance of an intrinsically charitable purpose.

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

It would be desirable for the legislation to indicate what an appropriate structure is, with the ability to expand the types of permissible structures, if necessary (for example, provide inclusive examples).

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

The definition of government body should be clarified in the legislation, particularly to make it clear that it includes local government.

In our view the issue of the extent to which a charity can be 'controlled' by government was not conclusively determined by *Central Bayside General Practice Association Ltd v Commissioner of Central Bayside State Revenue* (2006) 228 CLR 168. That decision confirmed that an entity can have charitable purposes that are correlative to government purposes. Undoubtedly charitable entities can and should be established by government, where appropriate, however the legislation could provide guidance to indicate what factors would demonstrate

that a government established entity is not in fact independently carrying out charitable purposes. Therefore, a statutory definition of charity should clarify the issue of control (for example, it should provide direction in relation to the composition of directors, members, etc).

Consultation 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?

Where case law has developed the concept of what are other purposes beneficial to the community these should be specifically listed in the legislation as coming within the fourth head of charitable purposes, being other purposes beneficial to the community. However, in considering whether to expand charitable purposes, it is necessary to consider whether such an expansion of charitable purposes is appropriate on policy grounds.

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

Charitable purposes should be expanded to explicitly include purposes that include the protection of the natural environment and promotion of sustainable energy practices. Although such purposes may already be considered to come with the fourth head of charity, being other purposes beneficial to the community, it would be preferable to explicitly state such a purpose as being charitable.

There should be a review of all State and Territory legislation to identify what legislative extensions have been made to charitable purposes at common law. For example, section 103 of the *Trusts Act 1973* (Qld) provides that the provision of facilities for leisure and recreation, if provided in the interests of social welfare, is a charitable purpose, even though this would not be recognised as a charitable purpose under common law. Where such purposes have strong public recognition as being charitable, they should be adopted as such in the statutory definition.

Consultation 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 refer to our comments above that in introducing a legislative definition of charity for Commonwealth legislative purposes initially, the Federal government should work closely with the State and Territory governments to achieve a truly harmonised definition of charity. The proposed legislation should clearly state the policy objectives for introducing a legislative definition of charity and include a clear statement that the definition is intended to apply for all relevant legislative purposes. It should also state that additional conditions may need to be satisfied under other laws to enable registered charities to access additional benefits. There may need to be significant amendments to other laws to achieve a truly harmonised definition of charity and it is beyond the scope of this submission paper to comment on all the changes that may be required to be made. In particular, the Charitable Fundraising legislation of the States and Territories should be harmonised with the Commonwealth definition and given the current need for separate fundraising licences in each State and Territory (a lengthy and repetitive process), consideration should be given to a single fundraising licensing system under the auspices of the ACNC.

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

The process of establishing ADRFs is burdensome. It is difficult to establish an ADRF in a short period of time which impedes efficient fundraising efforts in the event of a disaster. There should be streamlined processes in place to enable an ADRF to be fully established and endorsed for DGR purposes within, for example, 48 hours of a disaster occurring. In this regard, it would be helpful to have precedent documents available on line to facilitate this process.

Currently, donations are only able to be received by an ADRF for a limited period of two years, although the fund is able to exist until it is fully applied to the purposes for which it is established. However, the purposes to which ADRF's are able to be applied are limited and should be expanded.

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

There are likely to be significant transitional issues in relation to flow on effects that a statutory definition of charity may have on other laws which will need to be managed. There are also likely to be significant transitional issues around the administration of the new law and regulatory arrangements, particularly in regard to avoiding duplication between the ATO and the ACNC. Significant support should be provided by the ACNC where the charitable status of existing entities will be reviewed by the ACNC, to enable entities to restructure and amend their constituent documents as may be appropriate. The ACNC should have a power to issue binding private rulings on the question of whether or not an entity is charitable in accordance with the statutory definition.

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