



9 December 2011

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

Dear Sir/Madam,

A definition of charity

We refer to Treasury's October 2011 Consultation Paper relating to the Australian not-for-profit sector (NFP). Please find attached The Myer Family Company's (MFCo) submission relating to this Paper. MFCo is a multi-family office providing a range of services to high net worth families, philanthropic foundations and NFPs.

Since 2004 MFCo has established over 60 Private Ancillary Funds (PAFs) which grant considerable funds to NFPs across Australia. Our role working with these PAFs also includes grant research and administrative functions and working closely with NFPs to inform and implement strategic giving programs. We also provide investment advice to many NFPs throughout the country.

While there are some consultation questions to which MFCo does not have specific comments, we are supportive of the statutory definition of charity providing clarity to the NFP sector and those wishing to support it.

If you would like to discuss this submission please contact us on (03) 9207 3000.

Yours faithfully,

Peter Winneke
Head of Philanthropic Services

Stacey Thomas
Manager Research

**A DEFINITION OF CHARITY
CONSULTATION PAPER, OCTOBER 2011**

SUBMISSION BY THE MYER FAMILY COMPANY – December 2011

Issues in defining charity – dominant purpose and peak bodies

Consultation questions

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?
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?

Paragraphs 40-57

We support the replacement of ‘dominant purpose’ with ‘exclusively charitable purpose’ to compliment common law rule. There must be great clarity in the Bill and any explanatory material in the difference between a charity’s purpose and a charity’s activities to reduce confusion and apprehension on the proposed replacement.

Issues in defining charity – public and familial ties

Consultation questions

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

Paragraphs 58-70

There are a number of organisations established to service the needs of small or geographically isolated communities, or sufferers of rare medical conditions. It is important that such organisations are not disadvantaged by lack of clarity around the terminology relating to ‘sufficient section of the general community’.

We agree with The Board of Taxation’s recommendation that ‘sufficient section’ be defined as one which is not ‘numerically negligible’ compared with the size of that part of the community to whom the purpose would be relevant.

There must be provisions within the Charities Bill to ensure that organisations that are charitable, are not disadvantaged because they potentially provide benefits only to family members such as single language groups holding a native title.

Issues in defining charity - benefit

Consultation questions

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 Island definitions or in the guidance material of the Charities Commission of England and Wales?
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?

Paragraphs 71-77

Any approach taken to clarify the term 'for the public benefit' should be clear, concise and reflective of the common law. The guidance provided by the Charity Commission for England and Wales is complicated and restrictive.

Issues in defining charity – presumption of public benefit and charitable religious organisations

Consultation questions

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

Paragraphs 78-92

In principle we support the notion of removing the presumption of public benefit as a way to increase confidence in the NFP sector by making all charities accountable for their activities. However, in practice this may create a number of complexities leading to disadvantage for select charities.

The majority of NFPs and private charitable trusts and foundations are voluntary organisations and many do not have the paid staff or resources allowing for complicated processes of demonstrating public benefit. While it is noted that 'some charities may incur some minor initial compliance costs in demonstrating that they are providing a public benefit' this should not be in addition to existing compliance costs for time and resource poor organisations. Inevitably, 'minor initial compliance costs' end up much more significant in practice.

The independent school sector in Australia is an example of organisations that rely heavily on their charitable status to solicit funds. Many seek funding from trusts and foundations to establish scholarships, and in some cases, specific funds have been established to provide scholarships for select groups of people (for example, people from specific remote or disadvantaged geographic regions, or those in necessitous circumstances). These funds provide a clear benefit, however, may be compromised by a public benefit test. It is imperative that any guidelines around public benefit take into account the special purpose of such funds.

Furthermore, there are a large number of testamentary trusts, dating back many years, that may potentially fail a public benefit test as they have been set up to provide benefit to specific groups. Consideration needs to be given to a grandfather clause to allow these

trusts to continue to operate as charities, taking into account the difficulties and significant expense in changing trust deeds that do not have provision for flexibility.

The establishment of the ACNC has been welcomed as an important mechanism for reducing the regulatory red-tape and confusion that currently exists for the NFP sector. In keeping with this, should the presumption of public benefit be removed, the ACNC should be in a position to assist charities in demonstrating their public benefit by providing clear, easy to understand guidelines and processes.

Issues in defining charity – activities to be in furtherance of charitable purpose

Consultation questions

10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of this charitable purpose?
11. Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

Paragraphs 93-98

As noted earlier, it is critical that NFPs are given clear guidance as to the difference between charitable purpose and charitable activities. It should be clear that NFPs can undertake activities that are not intrinsically charitable so long as those activities are in furtherance or in aid of its charitable purpose.

The requirement that the activities of a charity be in furtherance or in aid of this charitable purpose should not be exclusive to all activities as it may be to the detriment of organisations undertaking activities which are charitable but outside of the stated charitable purpose.

Issues in defining charity – disqualifying activities

Consultation questions

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

Paragraphs 99-114

We agree that in light of the High Court *Aid/Watch* decision the Charities Bill 2003 needs to be modified to reflect the ability of charities to engage in political activities, as long as those activities are in furtherance and in aid of its charitable purpose.

Issues in defining charity – type of entity

Consultation questions

14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?
15. In the light of the *Central Bayside* decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?

Paragraphs 115-123

There is currently uncertainty regarding the funding of organisations which 'but for a connection to government' would be charitable. We agree with the Board of Taxation

recommendation that the definition of government body be amended to provide clear guidance for both NFPs and funding bodies.

Issues in defining charity – charitable purposes

Consultation questions

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

Paragraphs 124-135

We agree that a comprehensive list of charitable purposes provides certainty and clarity for the sector and public particularly around seemingly ambiguous terms such as ‘advancement of social or community welfare’.

We agree with Philanthropy Australia’s submission relating to its suggested list of charitable purposes and that the following be included in the list of charitable purposes:

- (a) The advancement of community development;
- (b) The advancement of amateur sport under certain conditions;
- (c) The promotion of volunteering, philanthropy and the effectiveness or efficiency of charities; and
- (d) The provision of finance exclusively to organisations recognised as charities.

Each of the four suggested inclusions play an important and positive role in the community.

Issues in defining charity – State and Territory issues

Consultation questions

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

Paragraphs 136-144

The current differences and inconsistencies in State and Territory law lead to confusion and at times significant legal expense in the pursuit of clarity. We agree that a statutory definition of charity for Commonwealth purposes will provide a platform to have a harmonised definition for all levels of government.

Further, to assist determination of charitable purpose the statutory definition of charity should state that an activity or organisation that, ‘but for its connection to government’ would be charitable, is in fact charitable. This would reduce confusion for private ancillary fund trustees when determining grant making eligibility of organisations.

Issues in defining charity – Australian disaster relief funds

Consultation questions

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

Paragraphs 145-152

Australian Disaster Relief Funds (ADRF) provide institutions with a vehicle to allow a clear and easy way for the general public to donate funds in response to a natural disaster. As we

saw with the Victorian bushfires in 2009 and more recently with the floods of 2010, the Australian public has the capacity to be very generous in these times of need.

Providing advice to families who wish to strategically assist such communities in their time of need, we see time and again the limitations that heavily administered funds, such as ADRFs, impose on communities.

Best practice community development principles that should guide the rebuilding of communities after natural disasters include:

- Effected communities being able to operate with a degree of agency in determining the best response to suit their needs;
- Community members being able to participate and lead rebuilding efforts in a way that is meaningful to them; and
- Community members being encouraged and able to participate in, and redevelop, local economies.

With ADRFs inability to distribute funds to individuals and other organisations, even some with DGR status, only provide material aid, and rebuild community infrastructure to a replacement standard the funds are often not providing a holistic approach to rebuilding communities.

Some of our clients' philanthropy, both through formal structures and individual giving, assisted rebuilding disaster struck communities in the following ways:

- Provision of funds to allow families to purchase goods needed (rather than rely on donated good, thus reinstating personal choice and autonomy as well as contributing to local economies);
- Provision of funds to rebuild community infrastructure, not to a replacement standard, but to new specifications that now better reflect the communities needs and to avoid future destruction from a similar natural disaster;
- Provision of funds for projects which provide 'community wellbeing' by providing residents with much needed alternative focus and at times distraction; and
- Provision of funds for purposes otherwise catered for by public funds. For example, in the wake of the Victorian bushfires providing funds for extra teaching staff so that affected schools had the manpower to cater for the additional needs of the children at these times.

The above examples highlight just some of the ways that ADRFs could be better responsive to community needs. Other issues that may be considered are:

- The ease with which ADRFs are established; and
- The length of time available to receive and distribute funds.

Issues in defining charity – transitional issues

Consultation questions

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

Paragraphs 153-154

All issues have been identified within the body of this submission.