



NDS Submission

## Definition of charity



National Disability Services

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### **About National Disability Services**

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes around 700 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

In the 2011 Federal Budget, the Government announced that it would introduce a statutory definition of 'charity' for all Commonwealth laws to take effect from 1 July 2013. This current consultation is based on this commitment to legislate a definition; it does not ask whether a legislated definition is desirable.

NDS accepts this intent and is generally supportive of the Government's overall reform agenda for the not-for-profit (NFP) sector. After many years of inquiries there exists an opportunity to focus on the sector's work and how to enhance the public benefits it provides. This point is important: a principal criterion by which to judge whether a charity definition is successful is whether it supports charities to achieve their missions. Successful NFP reforms will help deliver a strong and healthy sector, promote public trust and confidence and improve the effectiveness of organisations.

## Responses to selected 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?

While NDS does not foresee issues for its current membership with amending the definition to replace 'dominant purpose' with 'exclusive purpose', the prominence of 'dominant' (or similar terms) in case law favours a formulation that would require a charity to have charitable purposes only, other than any purposes which are incidental or ancillary.

A definition of not-for-profit should be included in the statutory definition of charity, rather than as a cross reference.

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?

With respect to peak bodies, NDS notes that while the opinion of the New South Wales Administrative Decisions Tribunal is reasonable—that a body which enhances the long-term viability of charitable organisations by providing educational mentoring and support services is itself a charitable institution—it is the opinion of a tribunal only in one State.

NDS would prefer to include in the statutory definition peak bodies that exist to assist charities to achieve their purposes and advance the effectiveness and efficiency of charities.

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

The complexity in common law regarding this element of the public benefit test suggests that achieving clarification through the statutory definition is warranted.

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?

NDS agrees with the recommendation of the Not-for-profit Project at the University of Melbourne Law School that the public benefit test should be clarified further by stating in the legislation that:

- The benefit(s) may be tangible or intangible, direct or indirect;
- The benefit(s) are to be assessed in the light of contemporary needs and circumstances;
- The benefit(s) may be assessed against potential detriment(s), where appropriate; and
- The public benefit test should not inquire into the methods or opinions of the organisation.

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?

As noted above, clarification of key principles in the public benefit test is preferable. However, such clarification in the statutory definition will need to be supported by the regulator's provision of detailed guidance materials.

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?

While the introduction of a public benefit test might improve transparency and accountability, overseas experience suggests that requiring a charity to demonstrate public benefit could impose significant administrative and compliance costs on charities and on the regulator. This is undesirable.

NDS suggests that a better approach would be to retain the presumption of public benefit but provide the regulator with sufficient powers to enable it to require further information from charities if it has grounds to believe that the public benefit test is not met. This would be complemented by the existing requirement that charities whose purposes do not fall within the listed categories of charities must still prove 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?

The ACNC should be required to provide detailed guidance on the application of the public benefit test. As charities will report regularly to the ACNC, it is best placed to identify whether charities are continuing to meet this requirement.

10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

There should be no reference to activities in the statutory definition.

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

There should be no reference to activities in the statutory definition.

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?

NDS recommends that the legislation focus on purpose rather than activity. Whether certain political purposes are charitable should be left to the general tests of charitable purpose and public benefit.

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

There are good reasons why charities engage in political discourse and seek to change public policy in support of their charitable purposes. This should be allowed. The legislation should focus on purpose not activity.

If Government proceeds with an intent that charities are to be prohibited from advocating a political party or supporting or opposing a candidate for political office, these should be clearly identified as disqualifying purposes.

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

Recent years have seen governments encourage organisations to engage in partnership-type arrangements to deliver social services. It is therefore important to clarify the impact of partnerships, joint ventures, and shared service arrangements on the charitable status of organisations. In addition, the growth of social enterprises often involving a collaboration with a commercial or government entity and designed to facilitate a charitable purpose, should be encouraged.

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 list of charitable purposes in the *Charities Bill 2003* and the *Extension of Charitable Purposes Act 2004* represents a good basis for a list of charitable purposes but it should be expanded to include the additional charitable purposes recognised by the common law after 2004.

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

In recognition of improved ways of supporting people with disability to be active citizens, NDS recommends that the following additional charitable purposes are included:

- the advancement of citizenship and community development;
- promoting access to information and advice;
- the advancement of the effectiveness and efficiency of charities;
- the promotion of volunteering and the voluntary sector; and
- the advancement of sport and the provision of recreational facilities.

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

NDS believes that existing endorsements by the ATO should be 'carried over' to the ACNC. NDS sees a role for peak bodies to promote the new definition throughout their sectors, supported by guidance materials produced by the ACNC and information sessions funded by government.