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Australia

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Sir Gustav Nossal AC CBE
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Dear Chris,

Re: Consultation Paper, *A Definition of Charity*

Thank you for the opportunity to comment on the consultation paper, *A Definition of Charity*.

Philanthropy Australia was established in 1977 as the peak body for philanthropy in Australia. It works with the public and with its members to advance philanthropy and to achieve its overall goal of a strong and vibrant charitable sector.

Philanthropy Australia is strongly supportive of a single, uniform definition of charity and charitable purpose for all purposes and all levels of government. The existing inconsistencies between States and Territories, and uncertainties over the definition of charity under common law, has been a source of confusion and cost for many of our Members and the organisations they support, as well as the general public. Our primary interest is in ensuring the system is fair, clear and simple and that there are no unintended negative consequences to the charitable sector.

Philanthropy Australia has consulted its Members on this matter; however, the philanthropic sector is diverse and the views expressed in this submission may not be representative of all Members.

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?

Philanthropy Australia agrees that charities should be required to have exclusively charitable purposes. This is in line with the common law rule.

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?

It is in the interests of clarity as to the definition of charity to include indirect services such as 'improving the efficiencies of, and supporting, charities' within the list of charitable purposes.



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

We support the Board of Taxation's recommendations in its review of the Charities Bill 2003, 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. It is important that the definition of ‘public’ or ‘sufficient’ not discriminate against small rural communities, or sufferers of rare diseases which may affect very few people.

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?

Philanthropy Australia believes that an entity which meets all other characteristics of a charity should not be automatically excluded from charitable status because its potential beneficiaries are required to be part of the same family group. An appropriate modification should be made for native title holders in the legislation.

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?

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?

Philanthropy Australia urges against adoption of the 2003 definition of public benefit as we feel this is unnecessarily complicated and restrictive. Greater flexibility would be provided by providing guidance on the meaning of public benefit such as that included in TR 2011/4 rather than the extensive and complicated guidance provided by England and Wales.

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?

Philanthropy Australia understands that there is a need to ensure tax concessions are accessed only by organisations which are genuinely charitable. However, we are concerned that mandatory requirements to prove public benefit may be burdensome for little actual benefit. It is more logical, and more consistent with this legislation's aims of clarifying principles and reducing red tape, to assume public benefit and to require proof only for organisations where the benefit is in doubt.

Philanthropy Australia identifies the following particular issues with regards to requiring proof of public benefit:

- The majority of charitable trusts currently come under the fourth head of charity, which does not presume public benefit, but ATO has not required, in practice, any explicit information to prove public benefit at this time. If the new legislative definition requires charitable trusts to prove that they are for the public benefit, this may result in an onerous administrative burden for very limited gain. The public has an interest in ensuring that foundations are run efficiently, ensuring the maximum community benefit. It is Philanthropy Australia's view that an explicit requirement for



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charitable trusts to prove their public benefit would be a drain on time and resources, particularly since the vast majority of trusts have no paid staff.

- Philanthropy Australia also notes that a number of charities, particularly those located in regional areas, are small with relatively low turnover, have few or no paid staff and rely extensively on volunteers. Proving public benefit is also likely to be a burden on these organisations.
- Scholarships to educational institutes and prizes for artistic competitions have long been recognised as being charitable as long as they are open to application and are awarded on merit or basis of disadvantage. However, these may ultimately be awarded to only one recipient. It is crucial that such practice is not eroded by a public benefit test.
- Finally, necessitous circumstances funds and charitable trusts which exist for the relief of poverty for family groups, employer connections or for certain sections of the public may not be able to prove a public benefit. If a public benefit test is adopted there must be grandfathering provisions to preserve the charitable status of those current trusts as well as wills that have been drafted on that basis.

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

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

Philanthropy Australia suggests that it would be useful to further clarify the role of activities in determining an entity's status. Philanthropy Australia suggests adopting this clarification be taken from paras 30 and 31 in TR 2011/4, the section headed "Finding Purpose":

Finding purpose

30. The enquiry as to purpose is a holistic one. It is the substance and reality of the institution's purpose that must be determined.

31. The objects or objectives in the constituent documents of an institution, and the activities by which those objects or objectives are achieved, are the main factors to be considered in determining the purpose of the institution.

As a separate issue relating to activities, it could be clarified 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.

It should not be a requirement as to status that a charity's activities be in furtherance of the charitable purpose as this may result in the loss of charity status if a charity engages in a charitable activity outside of the stated charitable purposes. This may require a penalty but not loss of status.

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?

As the Consultation Paper points out, Section 8 of the Charities Bill 2003 definitely needs modification. Philanthropy Australia suggests that the concept of "disqualifying purposes" is superfluous and should be removed altogether.



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8.1, “the purpose of engaging in activities which are unlawful” is inappropriate as part of a definition of core activity. An organisation established for an unlawful purpose will not be a charity as its purpose will not be charitable. A charity which engages in unlawful activities will be dealt with in the appropriate jurisdiction, as would any organisation or individual which breaks the law. Philanthropy Australia also urges caution as there is no qualification with regards to time limitations or other boundaries. For example, would a charity which breaches occupational health and safety regulations be in danger of losing its charitable status? Would this apply retrospectively, so that a charity could be found to have breached regulations a decade ago – meaning that the ACNC could decide that it was not a charity from that time forward? This would have serious implications for charities which may be exposed to retrospective revocation of their charitable and DGR status, income taxation and penalising past donors for their donations (as they may be subjected to amended assessments, denying past deductions for gifts). It could act as a deterrent to donors and a barrier to effective fundraising. Furthermore, such a measure would penalise the community rather than the individual who carried out the unlawful activity.

While the suggested changes to section 8.2 of the Charities Bill 2003, dealing with advocacy and political activities, will strengthen the ability of charities to engage in advocacy activities, the proposed changes may raise some issues. Philanthropy Australia cannot see any reason why a charity should not be permitted to advocate support of a particular candidate for public office if the candidate’s policies will directly further the charity’s charitable purposes - or equally to oppose a candidate whose policies would run counter to the charitable purpose of the organisation.

Philanthropy Australia suggests that the definition of charity would be simplified and clarified to a far greater extent by removing reference to “disqualifying purposes” altogether.

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?

Philanthropy Australia is of the view that the definition of ‘government body’ in the Charities Bill 2003 lacks clarity and does not resolve the uncertainty on the issue for organisations that, because of their connection to government, may not be considered “charitable” (which are referred to in this submission as government connected organisations). As discussed at paragraph 119 -121 of the 2011 Consultation Paper, the Charities Bill 2003 defines a ‘government body’ to include a body controlled by the Commonwealth, a State or a Territory, as well as a body controlled by the government of a foreign country.

The Board of Taxation has recommended that the definition be amended to provide a clear definition of ‘government body’ including whether local government is included, and a clear definition of ‘controlled by government’, which we support.

Organisations which would be charitable but which are connected to government because they are creatures of state or federal statute or are subject to governmental control may not be charitable but this is not always clear. Whether a particular government connected organisation remains charitable within the general law definition of the term despite its connection to government is a question of fact and degree and must be established on a case-by-case basis by reference to the applicable case authorities. There are no clear rules or criterion to determine whether a government connected organisation is indeed charitable, which is a significant source of uncertainty for the organisations and those charitable trusts wishing to fund them.



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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?

Philanthropy Australia submits that the list of charitable purposes in the Charities Bill 2003 is inadequate. While it cannot be exhaustive, far greater clarity could be achieved by expanding it. If the purpose of the legislative definition of charity is to provide a clear framework for determining charitable status, it is better to be more explicit rather than less so.

A longer list of charitable purposes will lessen the need for organisations to seek advice (either from the ACNC or from independent advisors) about whether they are in fact charitable. This would also bring Australia further in line with other jurisdictions where the list of charitable purposes has been expanded. A good place to start for an expanded list would be the purposes listed in section 337 of TR 2011/4.

Philanthropy Australia particularly urges 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 philanthropy, including volunteering, and the effectiveness or efficiency of charities.

We also urge the Government to investigate the possibility of considering the provision of finance exclusively to organisations recognised as charities as a charitable purpose (particularly in the light of the recent Senate report *Investing for Good: the development of a capital market for the not-for-profit sector in Australia*¹)

It is worth noting that the majority of organisations which would benefit from an expanded list of charitable purposes are currently entitled to tax exemption – meaning that there would be little revenue loss for government. Importantly, however, an expanded list and the inclusion of purposes such as amateur sport will be of huge significance for those organisations which cannot obtain philanthropic funding due to a lack of clarity around their charitable status. In rural and regional Australia, the sporting clubs are often the centre of the community, reducing social isolation, providing a meeting point and facilities that are often available to other community groups. Not being able to support and fund sporting groups in a rural and regional context is often confusing and frustrating to many communities and seen as being unfair given the often vital role they play in these communities.

Philanthropy Australia has provided a suggested list of charitable purposes in Appendix A.

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

Paragraph 144 in the Consultation Paper refers to issues which are of great importance to Philanthropy Australia members. Under current circumstances, the inconsistencies between different Commonwealth, State and Territory laws create a confusing and unequal situation for philanthropic funders and charities alike. Philanthropy Australia supports a single statutory definition of charity across Commonwealth,

¹ http://www.aph.gov.au/Senate/committee/economics_ctte/capital_market_2011/report/index.htm



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State and Territory jurisdictions. This will simplify compliance issues for charities and reduce the administrative burden on charities and will provide consistency of treatment for a range of purposes. It will also ensure a level playing field for all philanthropic trusts, whether or not they are endorsed as Deductible Gift Recipients.

An uncertainty around the charity status of trusts which by choice or necessity make gifts to government connected organisations has been addressed by legislation in some States. Some States have enacted legislation to enable trustees, by making an election opting in to the saving provision, to distribute to non-charitable (which includes government connected) organisations if the recipients are deductible gift recipients. However there is a lack of consistency between States and the saving provisions cannot be used by all trusts due to the differing tax consequences of exercising the power. There is, for instance, significant disadvantage to testamentary trusts which have been endorsed as income tax exempt charities and which have named beneficiaries that are government connected organisations. Philanthropy Australia has a number of Members which are significantly impacted by this uncertainty, many of whom have therefore sought legal advice at considerable expense.

It would achieve the aims of simplifying and clarifying the otherwise complex area of grant making to government entities for charitable purposes, if the proposed legislation provided all charitable trusts (whether or not they are also public or private ancillary funds) will retain charitable status even if they make grants to government entities (whether or not the grant is for a specific program or is for infrastructure, or operational or general purposes) where the grant would be charitable but for the connection of the recipient to government.

Philanthropy Australia submits that to achieve the goals of greater certainty and administrative efficiency in relation to the 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. If the legislature makes a policy decision that particular types of government connected organisations should not in any circumstances come within the definition of a “charity”, then they could be specifically excluded from the definition.

Philanthropy Australia also proposes that for clarity the statutory definition of charity should recognise that charitable trusts created with non-charitable purposes which are able to be severed to leave a valid charitable trust should be recognised as charitable for Commonwealth purposes.

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

Philanthropy Australia can identify several issues with ADRFs.

Firstly, ADRFs can only be established in response to a particular disaster. Establishing a new entity for every disaster, rather than being able to use an existing structure to collect funds for a new disaster, is duplication of infrastructure, administration and effort, ultimately leading to a lack of efficiency. One possible solution would be to establish a general ADRF (Australia wide or one per State) which can open subfunds for each separate disaster. Philanthropy Australia suggests that greater efficiency and flexibility would result from enabling ADRFs to hold over funds in reserve at the top level which could be allocated to appropriate sub-funds for future disasters, or to collect funds to be held for immediate response to future disasters.

Secondly, in rural communities which are more likely than urban ones to be affected by disasters, much of the community infrastructure is owned by local council. Following the 2009 Victorian bushfires, the Victorian Bushfire Appeal Fund as well as many of Philanthropy Australia’s members found it difficult to



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fund this area of extreme community need. It would be useful if in the case of disasters, it were legal for ADRFs and other charitable trusts to fund community development work and replacement of infrastructure owned by local government. Philanthropy Australia proposes that for even greater clarity and efficiency 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.

Thirdly, ADRFs are established for the relief of people and re-establishment of a community, and gifts to them are deductible only for a period of two years after the fund’s establishment. It is an established fact that recovery from major disasters may take considerably longer than this. The example of the Black Saturday bushfires in Victoria in February 2009 is a pertinent one, with individual and community needs still arising more than two years after the disaster. Affected individuals and families are not always in a position to determine what assistance they need; many of those affected by Black Saturday are still not in a position where they can decide whether they wish to permanently stay within their affected community. Philanthropy Australia suggests extending this period to four years.

There are other issues with ADRFs around their structure and funding capacity, but Philanthropy Australia suggests that these are not closely related to the statutory definition of charity, and are more appropriately addressed as a separate consultation.

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

We have identified the following in the body of the submission:

- grandfathering of existing trusts for the relief of poverty or for necessitous circumstances where there is a private group of potential beneficiaries if public benefit is to be required
- maintaining charitable status for trusts where non charitable purposes are severed.

Once again, thank you for the opportunity to participate in the consultation process. It is very much appreciated. Philanthropy Australia looks forward to working with Government in the future to strengthen charity and philanthropy for a thriving and generous Australia.

Yours sincerely

Dr Deborah Seifert
Chief Executive Officer

Attachment: Appendix A, Suggested list of charitable purposes



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Appendix A: Suggested list of charitable purposes

- the advancement of education;
- the advancement of religion;
- the advancement of health and the saving of lives, which includes:
 - the prevention and relief of sickness, disease, disability or human suffering
- the advancement of social or community welfare, which includes:
 - the prevention and relief of poverty, distress or disadvantage of individuals or families;
 - the care, protection and support of those in need by reason of youth, age, ill health, disability, financial hardship or other disadvantage;
 - the care and support of members or former members of the armed forces, emergency services and the civil defence forces and their families;
- the advancement of community development, which includes:
 - retraining, finding employment, providing work experience, skills development, business incubation in disadvantaged areas or for people who have or are likely to experience difficulty in obtaining and maintaining employment;
 - providing facilities for meeting and holding events;
 - preservation or restoration of the natural and built environment, including community gardens, erecting statues, providing historical information;
 - providing health and community services information;
 - improving community facilities and access, including community transport;
 - supporting not-for-profit community groups with open entry requirements, including clubs and interest groups, which help in reducing social isolation or promote a sense of community;
- the advancement of the arts, culture, heritage or science;
- the advancement of all philanthropy, which includes volunteering;
- the advancement of amateur sport, which includes:
 - the provision of sporting or recreational activities or facilities with the object of improving the wellbeing of persons whose quality of life would be thereby improved by reason of youth, age, infirmity, disability, poverty, geographic isolation, or social and economic circumstances;
- the advancement of human rights, which includes:
 - the promotion and advancement of conflict resolution or reconciliation, and the promotion of equality, diversity and religious or racial harmony;
- the advancement of animal welfare;
- the advancement of the natural environment, which includes:
 - the advancement of environmental protection or improvement;
- improving the efficiencies of, and supporting, charities;
- the provision of finance exclusively to organisations recognised as charities;
- activities or organisations that “but for its connection to Government” would be charitable;
- the promotion of the efficiency of the armed forces of the Crown, or of the efficiency of the police, fire and rescue services or ambulance services; and
- any other purpose that is beneficial to the community.