

# Royal Flying Doctor Service

## Submission to Treasury on: 'A Definition of a Charity'

### (Consultation Paper, October 2011)

## Introduction

The Royal Flying Doctor Service (the **RFDS**) provides an aero-medical health service for those who live, work or travel in outback and regional Australia. We are a not-for-profit organisation, supported by the Commonwealth and State and Territory Governments. We also receive generous donations from the community and corporations and generate certain funds through services provided under competitive tenders.

In early 2011, the RFDS made a submission in response to the Australian Government's scoping study for a national not-for-profit (**NFP**) regulator which identified centralising functions, regulation and oversight at a federal level, along with reducing compliance costs for the NFP sector, as key goals of NFP reform.

Against the backdrop of priorities identified in its earlier submission, the RFDS considers that the complex and significant task of defining a "charity" must provide a definition that:

- is flexible enough to allow for ongoing changes in the NFP sector;
- supports the regulatory role and importance of the Australian Charities and Not-for-profits Commission (**ACNC**) to allow the NFP sector to deliver services in an efficient and consistent manner;
- is supported by ongoing guidance from the ACNC in terms of identifying charitable purposes and activities of a charity; and
- results in consistent and comprehensive regulation of the NFP sector across all States and Territories.

The RFDS has responded directly to a number of the consultation questions below which are of relevance to the operations of RFDS or which we believe address the most significant challenges and opportunities in reaching a practical and beneficial definition of charity for the NFP sector.

## Response to 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?*

The RFDS is comfortable with replacing a 'dominant purpose' requirement with the requirement for a charity to have an exclusively charitable purpose.

The RFDS considers that a flexible approach to regulating the definition of "charitable purpose" is important, which would be achieved by the legislation setting out a generic framework supported by on-going guidance from the ACNC. It prefers this approach to the alternative of the legislation setting out a statutory definition that specifically includes pursuit of particular purposes which cannot adjust to the changing needs of the NFP sector over time.

The RFDS also suggests that:

- (a) the requirement to have an exclusively charitable purpose should be expressed as an ongoing requirement and not only as a requirement upon the establishment of an organisation; and
- (b) the ACNC should have a key role in providing ongoing guidance to the NFP sector, so that there is certainty about what is required for NFPs to continue to meet this test.

### **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 decision of the New South Wales Administrative Tribunal seems sensible to the RFDS, in imposing a commonality of purpose test for a peak body to be considered a charity.

The RFDS does not see any reason why peak bodies or other variously structured member bodies (such as fellow bodies) should be automatically presumed to have a charitable purpose in all circumstances. RFDS considers that many differently constituted associated or supporting bodies that further the charitable purposes of a member or peak body should, if separately required to do so by the ACNC for registration purposes, also be able to satisfy a flexibly defined, consistently applied charitable purpose test that is described in our response to Consultation Question 1.

The RFDS submits that:

- (a) sufficient clarity exists in support of the findings by the New South Wales Administrative Tribunal for proceedings brought in that jurisdiction (noting that a court of a different jurisdiction is not bound by the NSW findings and therefore conflicting outcomes may arise if a similar case was brought in another jurisdiction);
- (b) peak bodies of charities should not automatically be considered to have a charitable purpose but should be allowed to prove their charitable status, as is the case for any other type of representative body (such as member, associated or supporting bodies), if they can satisfy the necessary requirements; and
- (c) if a peak body or any other member, associated or supporting body satisfies the not-for-profit requirements and other requirements for obtaining charitable status, RFDS would be comfortable that this body should satisfy the charitable purpose test.

### **Consultation Questions 5 and 6:**

*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?*

**AND**

*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 RFDS supports the concept of providing a “public benefit” clarification as a principles-based approach and submits that the ACNC should have the flexibility to provide guidance material and make necessary determinations based on those clear and publicly available principles.

The RFDS would not like to see these principles set out in legislation or be too narrowly defined, as this could limit the ability of the ACNC to respond to ongoing changes in the NFP sector, including accommodating diversity within the NFP sector. For example, section 3(b) of the Ireland Charities Act 2009 (set out in Appendix A to the consultation paper) provides a limited set of circumstances for when a gift will be of public benefit. Over time, the RFDS considers that the framework will need to adapt for new conditions and it may not always be suitable to rely upon legislative change when such circumstances arise.

The RFDS supports the approach taken for flexibility and accommodating diversity of the sector such as in England and Wales, and submits that the ACNC should seek a role in providing guidance on this issue similar to the manner in which the Charity Commission for England and Wales does so in that jurisdiction. However, it will be important for the ACNC to tailor any guidance to the specific environment of Australia rather than simply seek to replicate the guidance, conditions and standards that presently exist in England and Wales.

In summary, the RFDS submits that:

- (a) it favours a non-statutory approach in explaining and determining the “public benefit” of an organisation;
- (b) guidance provided, and updated, by the ACNC that is clear, consistent and publicly available should support a non-statutory approach toward determining “public benefit” of an organisation; and
- (c) any guidance developed to support a “public benefit” test must reflect the environment and conditions within Australia rather than seek to replicate guidance available in other jurisdictions.

#### **Consultation Questions 10 and 11:**

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

**AND**

*Should the role of activities in determining an entity’s status as a charity be further clarified in the definition?*

The RFDS is comfortable with the approach that activities of a charity need to be in furtherance or in aid of its charitable purpose, provided that the ACNC plays a role in ensuring that a common sense approach is broadly applied in each circumstance so that, for example, an organisation could not lose its status as a charity for isolated or insignificant events.

The RFDS sees a clear role for the ACNC to identify, on an ongoing basis, the key considerations that would affect the charitable status of an organisation based on its activities undertaken. Activities undertaken by charities over time will inevitably change and may no longer remain an activity of a suitable or satisfactory charitable purpose. In these circumstances, it would be important for the ACNC to embrace a role that emphasises an ongoing focus on charities continuing to undertake appropriate activity that furthers or aids its charitable purpose.

The RFDS considers that, in determining the purpose and activities of a charity, it would not be necessary to include limited conditions in legislation (such as those that exist in Ireland in relation to the application of real and personal property). The RFDS considers that seeking to include specific examples of activities in a legislative definition of charity could result in an sudden increase of demands made to the ACNC or Government for activities relevant to individual organisations to be

included in a legislative list, for the comfort of those individual organisations. In this circumstance, the existence of an ever-expanding legislative list of examples may only serve to confuse, not clarify, the circumstances in which the activities undertaken by a charity may affect the determination of its charitable status.

In making determinations of activities of a charity that further or aid a charitable purpose, the RFDS suggests that the ACNC should take into account the broad overall scope of activities performed by the charity. The ACNC should make its determinations consistent with the principles clarified in the *Word Investment* case and in particular, should take into account whether those activities, however funded:

- meaningfully support the NFP's charitable purpose; or
- contribute towards the overall achievement of the core charitable purposes of the NFP organisation.

The RFDS submits that:

- (a) a common sense approach should be taken to avoid a charity losing its charitable status for an isolated or insignificant event, particularly if an exclusively charitable purpose test is adopted (see RFDS response to Consultation Question 1);
- (b) it is comfortable that a charity should be required to carry out activities in furtherance of or in aid of its charitable purpose;
- (c) any determination of an NFP's activities must take into account the broad overall scope of activities that support the NFP's charitable purpose, however these activities are funded (i.e. an ACNC determination should not necessarily isolate a particular activity without due consideration of the NFP's full range of operations); and
- (d) a list of example activities should not be included in a legislative definition of charity and instead it should be the role of the ACNC to consider and provide guidance and certainty on the legislative definition of charity once it is introduced.

#### **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?*

The list is a broad list with generic headings under which multiple causes can potentially fall, with a similarly broad catch-all which should be sufficient to capture any other charitable purposes identified in the lists presently set out in England and Wales, Scotland, Ireland and Northern Ireland legislation.

The RFDS supports this approach as it is consistent with its identified priority of legislation being drafted flexibly to adapt to changing requirements over time.

The RFDS supports this approach and is of the view that adding to this broad list of charitable purposes would only create more examples, more narrowly defined, which could result in confusion of a statutory definition of charity.

As to the question of whether "advancement" should include "prevention", the RFDS operates in a particular context where "prevention" could be as important as advancement of a charitable purpose. For example, many of our activities can broadly be classified as the advancement of health and the same activities could similarly be classified as the preventing harm to members of the community. We support the inclusion of this concept in the draft legislation.

The RFDS considers that a legislative definition of charity should create a framework in which an organisation can seek to satisfy the requirements of all the tests. It should then be the role of the ACNC to provide further and flexible guidance as appropriate to assist organisations to meet the requirements set up by the statutory framework.

The RFDS submits that:

- (a) it should be the role of the ACNC to provide guidance on appropriate charitable purposes that is consistent with a clear legislative framework;
- (b) a legislative definition of charity should not include a range of examples of appropriate purposes in a list or any other format, as this may unnecessarily create confusion for organisations in considering any 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?*

The RFDS acknowledges that the Government aims to introduce a statutory definition of charity to create a platform for discussion with States and Territories in relation to harmonisation of the definition of a charity, and fully endorses this approach.

Whilst the RFDS strongly supports reform at a national level, it believes that national reform should be supported by consistency across States and Territories in relation to the NFP sector. The RFDS sees the approach toward a legislative definition of charity as the first step in leading the way for an effective regulatory system to be implemented at a national level.

The RFDS is aware that reducing compliance costs is a key measure in providing efficient services that are funded in part or in whole by Government. Differing requirements across States, Territories and the Commonwealth generally can result in reduced transparency and accountability of public funds, particularly where an organisation is confused or not aware of the relevant compliance requirements in each jurisdiction. Alternatively, an organisation may simply be overly burdened by various compliance measures in some circumstances. A consistent and unified national system will minimise the occurrence of such examples.

The RFDS identified in its early 2011 submission on the Scoping study for an NFP regulator that a single point of regulation for national fundraising laws is a priority area requiring reform, and still believes this to be the case. Even comparatively large NFP organisations like RFDS would benefit from simplifying requirements and increasing certainty in this area to reduce compliance costs.

Although the RFDS acknowledges that the better targeting of tax concessions is the subject of another consultation paper currently released by the Government, we remain supportive of a streamlined and more efficient, but yet still rigorous and stringent, framework for granting concessional tax treatment. The RFDS supports the proposed role of the ACNC in relation to tax concessions and also supports the role of the Australian Taxation Office retaining special circumstance rules in considering charitable status for taxation purposes.

The RFDS submits that:

- (a) national reform of the NFP sector in legislating a Commonwealth definition of charity should be supported by consistency across all States and Territories;

- (b) consistency across the Commonwealth, States and Territories is critical in improving efficiency of use of funds in the NFP sector, including funds provided in whole or in part by Government through reduction of compliance costs; and
- (c) a rigorous and stringent framework for the treatment of tax concessions is supported by the RFDS.