



A definition of a charity

Response to consultation paper

Save the Children Australia

Background

1. Save the Children is Australia's leading independent emergency relief and development organisation for children. We save and protect children's lives and strive to give every child a safe and happy childhood.
2. Our programs in Australia and overseas aim to ensure that children:
 - no longer die from preventable diseases
 - have the opportunity to learn through access to education
 - are supported and assisted in an emergency, such as a natural disaster
 - are safe and protected from harm
 - understand their rights and responsibilities.
3. Globally, Save the Children touched the lives of over 100 million children last year in more than 126 countries. In Australia, we work in every state and territory with programs in more than 90 locations.
4. Save the Children's purpose is to inspire breakthroughs in the way the world treats children and to achieve immediate and lasting change in their lives. With the following objectives to support this purpose:
 - to ensure that children in Australia and overseas irrespective of race, colour or creed, have the means of survival, receive protection and have access to nutrition, health and education;
 - to work in accordance with the Rights of the Child first advocated in 1919 by the Save the Children founder Eglantyne Jebb and as expressed today in the United Nations Convention on the Rights of the Child for the welfare of children;
 - to promote the well-being of children everywhere and to address the issues which make children disadvantaged both at home and abroad;
 - to advocate the rights of children in accordance and consistent with the United Nations Convention on the Rights of the Child, and to seek to extend and improve the rights set out in that Convention; and
 - to operate in a manner so that Save the Children in Australia complies with the ACFID (Australian Council For International Development) Code of Conduct, and subsequent codes of conduct and codes of ethical outcomes as approved by the Board.

General comments

5. Save the Children recognises that this consultation paper into the definition of a charity is part of broader work that the Government is doing in seeking to support and provide an effective regulatory framework for the Not-For-Profit sector.
6. Save the Children, along with most charities in Australia, has a diverse revenue stream to support its purpose. The majority of Save the Children Australia's funding comes from grants from AusAID, other Australian Government departments and

international governments and organisations. We also receive significant support from the Australian public, businesses and trusts.

7. Save the Children is accountable to AusAID, the Government and the Australian public for the funding we receive. An important part of this responsibility is also being accountable at a local level to communities and national governments that we aim to assist.
8. Save the Children is also required to comply with the Australian Council for International Development's Code of Conduct which outlines standards on organisational integrity; governance; communicating with the public; finances; personnel and management practice; complaint handling processes.
9. Save the Children is a company limited by guarantee and must comply with the *Corporations Act 2001* (Corporations Act) legislation administered by ASIC and in addition to ASIC reporting requirements, Save the Children is required to pursue charitable purposes and apply its income to those purposes.
10. Save the Children is also accredited by AusAID. The accreditation process provides the Australian public with confidence that aid and development programs, are run by professional, well-managed, community-based organisations capable of delivering good development outcomes.
11. At a state and territory level, we are required to register as a fundraiser with the respective departments and comply with the relevant legislation regulating fundraisers.
12. Given the level of reporting and compliance that Save the Children and similar charities are already required to complete, the Australian Charities and Not-for-Profits Commission (ACNC) should not increase the regulatory burden for charities. It is in everyone's interest for our energies to be directed towards the rights and welfare of children and not on multiple and overlapping regulatory mechanisms.
13. Any changes to the definition of a charity should be flexible enough to continue to allow charities to find innovative new ways to raise funds to implement their programs and advocacy work.

Exclusively charitable purpose

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?

14. Save the Children supports a 'dominant purpose' definition as contemplated by the 2003 Bill. In our view, the exclusive purpose test is potentially too restrictive and open to interpretation in such a way that would limit the ability of Not-For Profits to engage in forms of 'profitable activities' that are related to its main purpose.
15. The reality is that the determination of whether or not activities or purposes could be considered incidental and non-charitable will be difficult to make. If the exclusive definition was adopted in legislation, it would be necessary for the new ACNC to engage in line drawing exercises to determine what level of ancillary activity is acceptable. This has the potential to create more confusion and prevent organisations such as Save the Children to engage in appropriate levels of innovative activity.
16. For example, many charities, including Save the Children, participate and run activities, such as online stores to raise funds. While the end financial outcome of these activities is for an exclusively charitable purpose, the activity in itself is not because of the commercial nature which is required to ensure financial viability.
17. An exclusive purpose definition may also require an arbitrary assessment of particular activities that are necessarily interconnected. Once again the process of assessment will likely be burdensome, often artificial and to no particular good effect.
18. A further example is a model of charging organisations that work with children for providing seminars on how to meet their legal requirements in child protection. This would be in the context of education on broader policies and procedures that workplaces can implement which are in addition to their statutory legal requirements.
19. The purpose of running these seminars is ultimately about protecting children by increasing awareness of organisations. However, it could be argued that this activity is not exclusively linked to Save the Children's purpose because the seminars include advice on how to meet statutory obligations which provides a commercial benefit to organisations. This activity could easily be linked to the dominant purpose.
20. Another unintended consequence of this definition could potentially be to create uncertainty in the Not-For-Profits sector in relation to what activities will comply with an exclusive purpose in a strict legal sense. There could easily be a scenario where the ACNC determines that the activities of an organisation are not consistent with its exclusive purpose.
21. However another organisation motivated by similar public benefit objectives, but with a different purpose, could be deemed to be compliant because of a more defined link with its exclusive purpose. This could potentially create confusion for smaller organisations which do not have the resources to ensure that its activities are all exclusively linked with its purpose.

Recommendation

22. That the definition of charity should include a dominant purpose test, as was proposed in the Charities Bill 2003.

Public benefit

23. Charities hold a unique position in society because of the public benefits they provide and as a consequence are able to access tax relief. The public has a vested interest in ensuring that the tax benefits that they provide to charities are truly for the public benefit.

24. In application to the ACNC, a public benefit test should consider:

- whether the public benefit that the charity is seeking to provide is linked to its dominant purpose
- existing tests that rely on dominant purpose, for example charities that are signatories to the ACFID code of conduct or AusAID accreditation.
- whether it is linked to other legislation in the regulation of charities including the 'In Australia' test to determine whether activities will qualify for tax exemption.

25. Save the Children notes that the test for measuring a 'public benefit' requires a subjective element which is likely to change as society's opinions and expectations evolve. Therefore, a definition of 'public benefit' should not try to categorise or define what types of activities are of a benefit to the public because this would limit opportunities for charities in the future.

26. The ACNC should carefully consider the extent to which it will require ongoing reporting by charities on the public benefits they provide, especially for organisations which already report to other government organisations which provide funding for programs.

27. Any test which requires a charity to provide evidence that the 'benefit to outweigh the harm' has the potential to increase the regulatory burden for charities especially if it requires an assessment of individual activities. Save the Children operates on a 'do no harm' principle and has established procedures for the ethical reporting on children. This principle is integrated into every aspect of our work including design, partnerships, implementation plans, results in the number of people reached directly and indirectly and the longer-term impact on the communities to reduce poverty.

28. The public benefit test should also not limit opportunities for advocacy linked with a charity's purpose. Save the Children supports the majority of the High Court decision in *Aid/Watch Incorporated v Federal Commissioner of Taxation* (Aid/Watch case) which held that generation of public debate is a purpose beneficial to the community and therefore charitable.

Recommendation

29. Careful consideration should be given to the level of ongoing assessment of 'public benefit' particularly requiring an assessment against harm.
30. The public benefit test should not seek to limit legitimate public debate on matters linked to a charity's purpose.

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?

31. Organisations that currently enjoy charitable status should automatically be deemed to meet the definition of charity as administered by the ACNC. Upon its establishment there should be no additional requirement for the ACNC to assess organisations that already have charitable status.
32. Furthermore, once an organisation has charitable status, there should be no requirements for any on-going assessment or auditing by the ATO in relation to this status. Ongoing assessment by the ACNC should seek to streamline current reporting requirement with an aim to reduce the regulatory burden on charities or at least ensure that it is no more cumbersome than the status quo.
33. Save the Children supports reporting to the ACNC on the public benefit in the Annual Report similar to the Statement of Recommended Practice that exists in the United Kingdom.
34. It would also be of assistance to charities if the new ACNC provided a template for reporting on the public benefit test for charities to use in their annual reports to assist with compliance.
35. If the ACNC decides to challenge an organisation's charitable status, the onus of proof in such cases should always be on the party challenging this status.

Recommendation

36. Once an organisation has charitable status, there should be no requirements for any on-going assessment or auditing by the ATO in relation to this status.
37. Save the Children recommends reporting on the public benefit in the Annual Report similar to the Statement of Recommended Practice that exists in the United Kingdom.

Activities of a charity

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

38. A dominant purpose test is the appropriate way to deal with this issue. The definition of charity should not be so restrictively defined that certain activities of an organisation that are not its dominant purpose can risk compromising its charitable status.

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

39. Save the Children is of the view that the 2003 definition is adequate.

Advocacy

Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

40. Charities ought to be able to engage in public affairs in such a way that is consistent with their dominant charitable purpose.
41. Any limit on 'political activity' would presumably require a body such as ACNC to make rulings on what is advocacy of a charitable cause and what is political commentary.
42. In many situations it may be difficult to draw a line between the two. For example, Save the Children has consistently adopted a certain position on the question of children of refugees being detained in immigration detention centres. This issue has been a subject of party political debate yet is obviously directly related to Save the Children's core charitable purpose of advocating for the welfare and rights of children.
43. Any test on political commentary or advocacy by charities ought to only impose limits on activity that is adverse to the organisation's dominant purpose which is subject to a public benefit test.
44. A more restrictive test would inherently be subjective and open to criticism by whichever side of politics felt aggrieved by a particular ruling.
45. Save the Children supports a broad scope for advocacy activities as exemplified in the Aid/watch decision. This is consistent with the concept of the public benefit test. As the High Court majority in Aid/watch case concluded, there is a public benefit in non-government organisations engaging in public advocacy and lobbying in relation to the appropriate allocation of aid money and related decisions by government.
46. There is a public benefit in having a wide range of organisations participating in public advocacy on issues that relate to charitable work and objectives that underpin those organisations. Many NGOs engage in lobbying work to further their objects and this legitimately involves sometimes critical discussion of government programs and policies.

Recommendation

47. Save the Children believes the Aid/watch decision sets appropriate parameters around advocacy work by Not-For-Profits and would oppose a more restrictive test.
48. The Government should consider giving legislative effect to the decision set out by the High Court majority in the Aid/watch case. This could be done through an appropriate definition of public interest which could cover public advocacy in support of a charity's objectives and dominant purpose. As the Aid/watch decision confirmed, a charitable organisation's purpose could be advocacy or awareness raising on its own.

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

49. Any restrictions on the types of political activity that may be engaged in by charities need to be carefully considered. It would be anomalous if restrictions were to be imposed which would on the one hand allow Not For Profits to advocate for particular policies yet on the other hand prevent them from commenting positively or adversely on particular parties or candidates in relation to whether or not they support the organisation's favoured policies.