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Response to Consultation Paper: A Definition of Charity

From: Southern Youth and Family Services (Association Incorporated)

Southern Youth and Family Services (SYFS) is an independent community based organisation which is Incorporated as an Association and a Registered Charity. The principle aims of SYFS are:

- To provide support and assistance to young people who are disadvantaged, homeless, or at risk of becoming homeless, and their families,
- To act as an advocate for, and facilitator of, structural change that achieves improved living situations for young people and their families.

We work to increase access for young people and families to:

- Secure and affordable, individual housing
- Employment, education and training
- Secure and adequate income
- Health supports and services
- Appropriate support services
- Clothing, food and other practical assistance.

We welcome this opportunity to be involved in the process of establishing a statutory definition of ‘charity’. Our responses to the Consultation Paper are listed under the consultation questions relevant to our field of knowledge and expertise. In summary, our principle concerns are that the definition:

- Is based on ‘dominant’ charitable purposes as opposed to ‘exclusively’ charitable purposes;
- Does not restrict the advocacy role of charitable organisations through restrictive definitions of political activity;
- Ensures that compliance and transition costs to charitable organisations are minimalised;
- Does not compromise independence of charitable organisations;
- Expands the list of charitable purposes to include the promotion and protection of civil and human rights and
- Does not include prescriptive descriptions of ‘activities’ in the definition or explanatory materials.

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.

Yes. The 2003 definition of ‘dominant purpose’ is an important component of the overall workability of the definition. This current review of the definition of ‘Charity’ is underpinned by acceptance that flexibility is necessary to enable it to reflect changing societal expectations, social conditions and issues. Such flexibility is jeopardised with the exclusivity clause. Many charitable organisations have ancillary objects that may not fit neatly within the final definition. Examples may be an object that concerns promoting the health and wellbeing of employees. On its own this object would not qualify as a charitable purpose, but when it is the sixth object of an organisation whose dominant purpose is charitable, it is unnecessary to exclude the organisation on the basis of an ancillary purpose.

Many organisations have some ancillary or incidental purposes that similarly, on their own would not qualify under the statutory definition of charity, yet do not detract from the charitable purpose. When these are not the main purpose of the organisation, the risk to excluding the organisation from the benefits of falling within the definition of charity is an unnecessary risk.

2. Does the decision by the NSW Administrative Tribunal provide sufficient clarification on the circumstances when a peak body can be a charity or is further clarification needed.

Our answer to this question relates also to our answers to questions 12 and 13.

The NSW Administrative Decisions Tribunal finding that a peak body could qualify as charitable when it enhanced the long term viability of charitable organisations is only a part of the needed definitions that include peak body work.

Linked to the role of peak bodies, the definition of charity needs also to first include:

- The pursuit of human rights
- The ability to undertake individual and *systemic* advocacy
- The ability to engender public debate / discussions on issues relevant to charitable purposes and
- The ability to influence government policy, law and programs.

Peak organisations vary in their operations and have different primary objectives. Those whose primary objective is to engender participation from marginalised voices in public policy debate may or may not work to support the long term viability of charitable organisations, yet their purpose is consistent with the purposes of charity. The definition of charity needs to include additional clauses to the findings of the NSW Administrative Decisions Tribunal that recognise the peak role in advocacy as qualifying for charitable status.

In the consultation paper it is proposed that organisations need to have a charitable purpose, be for the public benefit and that there be a form of ‘activity’ test included in the criteria.

We argue against activity criteria that would only allow advocacy, or ‘political activity’ to be an ancillary activity. Advocacy work could be a dominant activity in the pursuit of the

dominant charitable aim, for example in addressing homelessness (the prevention and relief of poverty).

A peak organisation can be set up as the instrument for collective advocacy on systemic issues that impact on the ‘clients’ of charities. Examples have included peak roles in law reform, or in advocating improvements to the income security of disadvantaged people. Peak organisations have been instrumental, for example, in changing the rates of payment to pensioners to align payments to a calculation based both on CPI and on a percentage of average male earnings. Organisations such as ours would join a peak body whose dominant activity is collective advocacy on structural change to improve conditions for homeless young people. Such a peak may not necessarily work to enhance the long term viability of our organisation, but plays a crucial role in achieving an ultimately charitable purpose.

The definition of ‘advancement’ needs to be broadened to include protection, maintenance, support, research, improvement, *prevention* and enhancement. Once that is done, the advocacy / political activity role of peaks would qualify as ‘prevention’ and would be deemed a charity, providing the purpose and public benefit criteria were met.

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

We would agree with the Board of Taxation’s Review of the Bill in its recommendation for clarity around ‘sufficient section’ of the public clause. Particularly, that it be defined as not numerically negligible when compared with the size of that part of the community to whom the purpose would be relevant. This clarification should be ample to allow for the establishment of charities for people suffering rare conditions, or living in very isolated communities, or experiencing social issues that are significant but not frequently occurring. This is also pertinent to the inclusion of the pursuit of Human Rights as a charitable purpose. An organisation established to promote the Human Rights of a sub-group in Australia may be operating for the benefit of a very small section of society, but the purpose is no less significant due to the low numerical count.

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?

Yes. We support modifications being made to take into account circumstances when it would be appropriate to recognise an institution as charitable even though its beneficiaries are related. The complexity of cultural issues surrounding understandings of ‘community’ and ‘family’ in Aboriginal and Torres Strait Islander cultures need to be considered in this review. This may be a broader issue than Native Title and Land Rights holders and we trust the ATO will consult with the relevant expertise in Indigenous communities to appropriately clarify this clause.

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?

The legislation should remain in the realm of general principles of public benefit to guide the decision made on a case by case basis.

The Ruling TR 2011/D2 provides some valuable guidance around the inclusion of an altruistic, social value or utility intent. We do not agree that the indicators of benefit should include the ‘structures’ of an organisation. This could represent over-involvement in defining how an organisation operates. The structures of an organisation are an organisation’s prerogative. Adequate requirements are contained in the regulations covering the registration of the legal entity of an 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 above.

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?

The current presumption of public benefit for only the first three Heads of Charity is an inconsistent approach to different types of charities. A public benefit test applied to all categories would be preferable if first:

- The Definition of Charity states that the entity must have a dominant charitable purpose (not exclusive);
- The list of recognised charitable purposes is expanded;
- Individual and systemic advocacy is recognised within the definition and is not limited to being an incidental or ancillary function;
- The definition of ‘advancement’ includes: protection, support, research, improvement, *prevention*, promotion and enhancement;
- Self-evident public benefit is recognised through a simplified process;
- Disqualifying clauses are explicit.

Then, the process of proving public benefit for existing charities as they transfer registration to the ACNC would need to:

- Make reference to existing organisational documents, such as the Annual Report and Constitution as the primary sources;
- Be straightforward, based on broad principles of public benefit and a check against disqualifying criteria;
- Ensure that organisations are not required to catalogue all activities across the organisation to assess whether incidental or ancillary activities meet the public benefit test;
- That compliance costs are minimalised through a one-off initial test followed by self-assessments;

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 first presumption is that the test should be reasonably simple, in plain English and devoid of unnecessarily onerous calculations of activity or objects. The ACNC has a role as the regulator and educator/support and these two need not be incompatible, as demonstrated by Fair Trading NSW which, for example, regulates the legal status of, e.g. incorporated associations, whilst at the same time provides facts sheets, model rules, phone advice and community education services.

Smaller charitable organisations will not have the funds for legal advice to assist in complying with the test, nor would it be a good use of their charitable funds. Reference to existing organisational documentation such as the Constitution and Annual Reports should be part of the test and may suffice for the more self-evident purposes and organisations. As mentioned previously, the test should not contain requirements to catalogue activities against distinct criteria, which would create enormous compliance costs for multi-purpose or larger organisations.

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

Entities for the advancement of religion would be subject to the same tests as those currently without the presumption of benefit, for example, a not-for-profit incest counselling service, a community neighbourhood centre, a peak organisation or a community legal centre. This would be a fairer system. It is not evident to many sections of the public why the advancement of religion is presumed to be of benefit whereas supporting victims of incest is not.

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

Again this relates to use of ‘dominant’ rather than ‘exclusively’ charitable purpose. It also relates to the definition of ‘furtherance or in aid of’ in that ‘prevention’ is a concept needing to be included. Activities that are part of strategies to prevent poverty may not appear as activities that appear to directly ‘relieve’ poverty. Such activities will further the charitable purpose, providing that the charitable purpose is inclusive of prevention.

The *Word Investment* decision has made clear that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as those activities are in furtherance of its charitable purpose. This is consistent with a ‘dominant’ charitable purpose approach.

Some activities of charities will not in themselves appear ‘charitable’, such as back office functions, establishing administrative ‘shared services’ branches or constructing an administration block. These activities would appear to be acceptable under the ‘furtherance or in aid of’ clause.

In assessing this requirement, it would be preferable for the ANC to be attempting to identify activities that fall within the ‘disqualifying’ criteria, rather than assessing all activities in a complicated cataloguing compliance regime.

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

No, for similar reasons as outlined above. The principle consideration should be the purpose of the charity and its public benefit. The nature of activities is not an easy or good indicator of whether it is charitable or not. As mentioned above, activities listed by an organisation such as back office functions or shared services further the charitable purpose, but in themselves do not appear charitable. Social Enterprise activities when broken down appear very similar to commercial activities, yet when they meet the not for profit provision and are established to support the charitable purposes of an organisation or organisations they should not impact on the charitable status, as found in the *Word Investments decision*. It is the underlying purpose of the activities that is key not the specificity of the actual activities.

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:

Yes. The statutory definition could define the disqualifying activities but complications arise in prescribing either in the statutory definition or the explanatory material guidance on acceptable political activities, such as how to engage with political parties.

Charities must not be government instrumentalities. Their independence of government enables them to have a voice on policy and legislation that may be contrary to the political line of the government of the day. Thousands of charities currently engage in political activity such as influencing public opinion, advocating for individuals to government authorities, advocating for systemic changes in policies and programs, lobbying Governments and other political parties and raising debates in the mass media. These organisations promote and further a civil and democratic society.

Charities that provide social welfare services, for example, have unique and valuable knowledge of the impacts of social policy, laws and programs on individuals. This knowledge is critical to processes to improve the outcomes for disadvantaged or vulnerable people and needs to be included in policy making processes. Charitable organisations also play a significant role in prevention of hardships. For example their activities are not only geared to addressing the effects of personal or family crisis, but also to preventing such crisis in the future through systemic change.

With an adequate definition of Charitable purposes, these activities form part of acceptable strategies to pursue the charitable purpose. Entities must pass the public benefit test and meet the requirement that their dominant purpose is charitable. The primary test for whether an organisation can engage in political activity is whether it furthers and is in aid of its dominant purpose. Beyond that, apart from restricting *partisan* political purposes it is not necessary to single out advocacy / political activity for special legislative treatment.

We argue against prescribing acceptable political practices in guidance materials. Our main concern is that a government instrumentality would be prescribing how government can be influenced or the processes that can be used and that there is an apparent conflict of interest in that level of control.

As argued previously, advocacy may be more than an ancillary or incidental purpose of a charity. For example, some instrumentalities may be established to undertake collective advocacy on behalf of charities or charitable consumer groups may have as their primary purpose changing policy or legislation that negatively impacts on their members.

Beyond making explicit that charities cannot use their charitable resources (property or personal) for the promotion of a political party or candidate, further regulation is not necessary.

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

We agree with providing a disqualifying clause pertaining to promoting a political party or candidate publically or externally to the organisation. Internally, individuals or groups of individuals associated with the organisation have their democratic right to advocate for a political party and to undertake activities in the public realm as individuals.

However, on occasions, some charities may face dilemmas under this clause if it includes not 'opposing' a political party or candidate. From time to time, in Australia, a candidate or party may arise that is contrary to a charity's core values, such as anti-discrimination. When this occurs, the charity needs to be able to participate in public debate on the issues and will attempt to influence public opinion. It could be a fine line between when this is opposing a candidate / party or a party neutral stance.

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

No. The provisions under the Charities Bill 2003 are adequate.

15. In the light of the Central Bayside decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?

The explanatory materials need to include local government as a government body.

Charities that have contracts with governments to provide services are not controlled by government even if aspects of the service delivery are regulated by government. The independence of charities from government is important and not compromised by being in receipt of government funding.

For tax and charity purposes it is important to clarify the meaning of 'partnership' with government or other non-charity entities. Public policy is promoting the use of partnerships with businesses and the term 'partnership' is frequently used between government and non-

government agencies to describe a contractual arrangement. This frequent usage is often a misnomer and should not impact on a charity's status as independent of government.

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

The definition of 'advancement' needs to be clarified to include 'prevention' across all the accepted Charitable Purposes.

Clarity would be improved if the following were listed in their own right, instead of possibilities under 'other':

- The promotion and protection of civil and human rights
- The promotion of community development to enhance social and economic participation.

The explanatory materials should make clear that the advancement of social and community welfare includes assisting people who are disadvantaged in terms of access to housing.

18. No comment

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

We trust that there will be a further round of consultations after a draft statutory definition of charity is formulated.

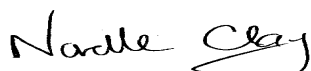
Transitional issues are dependent on the outcome of your considerations on:

- Dominant vs exclusive purposes;
- Whether activity tests are included in either the definition or explanatory materials;
- Whether existing charities will need to undertake a compliance test prior to transferring to the new arrangements;
- Whether or not to single out political activity for special consideration.

We look forward to making further comments on transitional issues in the next phase of consultations.

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