



Response to Consultation Paper A Definition of Charity

Overview

Sparke Helmore is an integrated national law firm that provides legal services to business and Government. In addition, we routinely provide advice to charities and other not-for-profit organisations, as well as people and groups who wish to establish such entities, through our Commercial practice and via pro bono work that we undertake as part of our national pro bono and community engagement scheme called 'SHARE'.

We routinely deal with people, charities and other not-for-profit organisations that experience the ambiguities and complexities of the existing regulatory system, who require legal advice and ongoing support to embrace the available endorsements and concessions, and need guidance to fully appreciate and comply with their governance and regulatory obligations.

Sparke Helmore welcomes the Federal Government's commitment to law reform for the third sector and appreciates the consultation process being undertaken. In principle, the writer accepts the utility of a statutory definition of charity and charitable purposes and of the need for a national third sector regulator as it will ultimately create more certainty, help the functioning of the sector in the public interest, and facilitate best practice.

The views contained in this response paper are the views of the writer and our Pro Bono Lawyer, Katy Mooney, who has kindly assisted in the preparation of this paper. The views in this paper do not necessarily reflect the views of Sparke Helmore Lawyers generally and is not intended to constitute legal advice.

A handwritten signature in black ink, appearing to read 'M Rosenfeld'.

Michael Rosenfeld | Executive Counsel, Pro Bono & Community Programs
Special Counsel - Public Interest & Charity Law
Sparke Helmore Lawyers

Level 7 Sparke Helmore Building, 28 Honeysuckle Drive Newcastle
PO Box 827 NEWCASTLE NSW 2300
p: +61 2 4924 7673 | m: 043 834 2646 | f: +61 2 4924 7299
e: michael.rosenfeld@sparke.com.au | www.sparke.com.au

*We contribute to law reform processes through 'Share',
Sparke Helmore's pro bono & community engagement scheme*



Consultation 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?**

Charities may be confused if exclusivity of charitable purpose is required. In our experience, charities have multiple purposes and the concept of ‘dominant purposes’ is more consistent with the reality of their operations. The concept of ‘dominant purposes’ is also more permissive of the notion of an ‘incidental purpose’, that is, one that contributes to the achievement of a dominant charitable purpose. The term ‘exclusively’ suggests there is no scope for such incidental purposes and it would be confusing if such provision in any new Bill was then followed by exceptions that seek to clarify that ‘exclusivity’. Exclusivity as a concept may also inhibit creative responses to community need, if there is a perception that ‘exclusivity’ of charitable purpose does not permit incidental or ancillary purposes. Ultimately, we appreciate that this is more a matter of language to ensure that definitions adopted are self-explanatory, but nevertheless important for the sector, its understanding and compliance.

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?**

We are satisfied that the decision in *Social Ventures Australia Limited v Chief Commissioner of State Revenue* [2008] NSWADT 331 clarifies whether a peak body can be held to be charitable in nature. However, it would be prudent to reflect the principles enunciated in the decision in any new Bill for clarity – specifically to articulate the purpose of a peak body (e.g., to represent, support, advocate, and contribute to the operational sustainability and efficiency of charities) as a charitable purpose and reflect the boundaries created by the decision in further legislative provisions.

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 recommend some utility in the adoption of the term ‘private interests’ or utilisation of the term ‘private’ as an exclusionary component in the definition of ‘public benefit’. Alternatively, it may be advantageous to simply delete the word ‘sufficient’ from the definition as the current phrase may serve to disqualify activities that seek to benefit the most marginalised and unrepresented in society due to their small numbers. We are also concerned that certain trusts (e.g., Necessitous Circumstances Funds) that benefit disadvantaged persons (e.g., in the relief of poverty) in a specific group or population are not detrimentally affected by the definition.

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?

The sentiments expressed above in question 3 also applies in respect of this question. We suggest that the removal of the word “sufficient” from the phrase pertaining to the general community may address unintended consequences to beneficiaries with family ties. This, in addition to a definition of what is a ‘private interest’, that excludes native title property rights, will address the potential for ambiguity in relation to this issue.

5 Could the term ‘for the public benefit’ be further clarified, for example, by including additional principles outlined in 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?

We consider there is merit in specifying additional elements to clarify the term ‘for the public benefit’. Our concerns derive from the difficulties posed by s 7(1)(b) of the Charities Bill 2003 that includes the term ‘practical utility’. This term suggests tangibility of outcomes and is not an optimal acknowledgement of the diversity of the sector and the relative intangibility of some cultural, educational and religious activities. In the alternative, we would suggest ‘practical utility’ be replaced with concepts specified in TR2011/D2 at paras 117-118. The sub-section may be alternatively phrased as follows: “it has a social value or utility that is of worth, advantage, importance or significance, whether tangible or intangible’.

TR2011/D2 refers to the term ‘altruistic’ when discussing the meaning of public benefit. *The Report of the Inquiry into the Definition of Charities and Related Organisations June 2001* stated at page 124 that altruism was characterised as “... a voluntary assumed obligation towards the wellbeing of others or the community generally.” We consider that prescribing that a charity must be altruistic is unnecessary as it is largely synonymous with the term ‘charitable’ and it would add a further element that will need to be defined or interpreted and that interpretation may raise more issues than it resolves.

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?

We would suggest that optimal support to the sector will be provided with a clear statutory framework, but we would nevertheless recommend discretionary elements that will accommodate the diversity of the sector. Whilst England and Wales have opted to rely on the common law and guidance material, we observe that this approach is largely the situation at present in Australia. The current reform agenda and commitment is an opportunity that should enable sufficient legislative definition to be achieved, with terminology that empowers determination on a discretionary and case-by-case basis.

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?

We agree that the demonstration of public benefit for existing and prospective charities can be burdensome. What will be critical in this regard will be a clear administrative framework that will distinguish charities in which their public benefit is considered self-evident, from charities in which their public benefit will require substantiation and further consideration. The common law presumption of public benefit has an inherent validity and utility that should not be discarded with the adoption of a statutory public benefit test. The presumption may be well reflected in the Australian Charities and Not-for-profits Commission (ACNC)'s administrative processes, in which it may acknowledge that the advancement of health, education and religion are purposes that are self-evident. Consequently, this will reduce the burden on charities that fall within those categories, unless there are specific concerns raised in the community regarding their operations and/or fulfilment of public benefit criteria. For remaining charities, we would emphasise the importance of administrative processes that are streamlined and do not require significant expenditure of resources for compliance.

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 provide clear guidelines and education as to how applications will be assessed and what documentation will be necessary in that assessment and also the nature of the self-assessment that charities must undertake. In our experience, not all charities will be best catered for by 'tick-the-box' application forms and, for those charities, it will be necessary for the ACNC to have mechanisms in place so that organisations can make detailed submissions regarding their particular circumstances.

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

As specified in the answer to Question 7, we suggest that the advancement of religion or education could benefit from streamlined processes in any new administrative regime as their public benefit would be generally self-evident. What may pose challenges to these entities are circumstances in which their 'public benefit' are subject to complaint or public scrutiny. We would suggest that in such circumstances the onus must remain with the charity to substantiate its satisfaction of public benefit. We note that the website for the Charity Commission of England and Wales outlines clear procedures for the public to make a complaint to the Commission and such complaints will provide an avenue for the review of such entities.

We would recommend caution in retaining the proposed definition of religion in s 12 of Part 3 of the Charities Bill 2003. We note that no other charitable purpose is defined so extensively and we suggest it is unnecessary considering the public benefit provisions of that Bill, the amendments we have proposed, and existing law.

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

We agree with the provision in the Charities Bill 2003 that requires activities of a charity to further or aid its dominant purposes. We consider that it is in the public interest to require charities to undertake even incidental activities that will ultimately contribute to their charitable purposes. A complication arises of course where commercial enterprises are conducted to fund charitable purposes but, as TR2011/D2 states, it is important that "... the activities that it carries on are carried on in furtherance of that charitable purpose rather than those activities being an end in themselves".

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

We refer to our response to Question 10.

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?

We consider that charities should have the ability to advocate to Government (e.g. regarding law and policy reform) in order to further a charitable purpose, support a political candidate or party whose policies will assist in achieving their charitable purpose, or promote a particular political position to the community in furtherance of their charitable purpose. The capacity of charities to promote their own interests in political discourse that will impact their charitable purpose is a capacity that is clearly in the public interest. We consider that it is important in section 8 to distinguish between 'activities' carried out by a charity in furtherance of, or incidental to, its purpose and what is the charity's dominant purpose. Consequently, the section should be amended to remove sub-section 2(c) and sub-sections 2(a) and 2(b) should be amended to include the word 'dominant' when referring to 'purpose'. The latter amendment will clarify the very intention of the provision and not erode the capacity of charities to advocate in the political sphere.

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

We refer to our response to Question 12.

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

The definition of 'entity' at section 3 and the provision at Section 4(f) is, in the main, appropriate. However, including the term 'partnership' may lead to some uncertainty particularly in a sector where auspicing arrangements and joint ventures between charitable organisations and groups of people with consistent purposes are common place. We agree that an explanatory note to distinguish what is classically considered a partnership for legal and taxation purposes is necessary, so that joint ventures are understood to be excluded.

15 In the light of the *Central Bayside* decision is the existing definition of ‘government body’ in the Charities Bill 2003 adequate?

Many charities rely on government funding and, increasingly, government contracts are exerting more control over the entities being funded. We note that the decision in *Central Bayside* [2006] HCA 43 clarified the scope of Government control by emphasising that the furtherance and fulfilment of charitable purposes is a significant consideration. We would recommend amendment to the existing definition of ‘government body’ in section 3 to reflect the decision in *Central Bayside*.

Many Government-associated entities (e.g., a regional hospital that is a Public Benevolent Institution) would be concerned by the current definition and consideration should be given to excluding certain Government-associated entities (e.g., hospitals, schools, or even emergency services) from the definition. The definition should also be enhanced to allow optimal discretion for the determination of whether a Government-associated entity is indeed charitable.

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?

We suggest that the re-consideration of the Charities Bill 2003 is an opportunity to extend beyond what we have accepted as traditional charitable purposes and to expressly include additional purposes that have already been recognised domestically and in acceptable overseas jurisdictions. We are often approached by entities that are currently not considered charitable at Commonwealth law (e.g., sporting groups, some social enterprises) in the hope that we may be able to assist them to secure Deductible Gift Recipient (DGR) endorsement and charity tax concessions. We often explain that, despite their contribution to the community and their not-for-profit ethos, they are not considered to be charitable entities or, depending on their activities, may indeed be charitable (e.g., a charitable fund that makes grants for heritage building conservation) but are unable to secure DGR endorsement as they do not fit within an existing category for such endorsement.

We would therefore recommend consideration of a more comprehensive listing and expansion of charitable purposes to remove what are essentially artificial distinctions that prevent some very beneficial community-oriented and not-for-profit entities from being classified as charitable. Along with this, we consider there is a real need for reform to enable DGR and charity tax concessions to be accessible and linked to the threshold determination of an entity’s charitable status.

There is certainly merit in adopting the approach of overseas jurisdictions in comprehensively listing charitable purposes and we would suggest inclusion of the following in the Charities Bill 2003 as additional charitable purposes:

- Amateur sport;
- Human rights and advocacy;
- Heritage preservation and conservation;
- Environmental protection;
- Animal welfare;

- The saving of lives and emergency services;
- Disaster relief, recovery and community reconstruction; and
- Philanthropic giving [which may expressly cover trust funds, public and private ancillary funds, including those recognised as charitable by a State or Territory].

We support retention of ‘other purpose that is beneficial to the community’ as listed in section 10(1)(g) of the Charities Bill 2003, as this acknowledges the diversity of the sector and will permit sufficient discretion to determine matters on a case by case basis. In particular, we suggest this discretionary element may be extended to entities operating not-for-profit social enterprises that contribute significantly to a charitable purpose via their activities.

We also suggest that the core definition at section 4 of the Charities Bill 2003 [specifically s 4(1)(b)(i)] should refer to section 10, which lists charitable purposes.

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

We refer to our response to Question 16.

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

We consider that harmonisation of laws with respect to the definition of charity is an essential goal, not only for consistent terminology and classification of such entities, but also to ensure equality of treatment in matters of regulation (e.g., fundraising licensing, regulation of charitable trusts) and exemption (e.g., from duties and taxes) at State and Territory level. Whilst we appreciate that a Commonwealth statutory definition of charity may not prevent States and Territories from modifying the statutory definition for their own purposes (as stated at para 143 of the consultation paper), we would suggest that the ideal position is a commitment by States and Territories through such forums as the COAG Reform Council for harmonisation of definition, terminology, regulation and treatment of charitable entities. In particular, we are concerned that existing charitable trusts that are permitted by State or Territory law to distribute to non-charitable DGRs continue to be recognised as charitable with any Commonwealth definition or harmonisation of laws.

19 What are the current problems and limitations with ADRFs?

We recommend that the definition of charitable purposes should reflect the purpose and operation of ‘Australian Disaster Relief Funds’ (ADRFs). The answer to Question 16 above mentions that a charitable purpose with respect to ‘Disaster relief, recovery and community reconstruction’ should receive consideration.

We agree that greater definition and explanatory infrastructure is required for the optimal utilisation of ADRFs as a pathway for the delivery of relief in disaster affected communities. Our impression is that such funds are of significant utility, but what is lacking are streamlined procedures and support in the form of precedent and model documentation for the facilitated establishment of such funds and even support on best practice regarding how applications for relief should be made, considered and directed. The provision of precedent and model documentation for the establishment and operation of ADRFs will ensure consistency of operation throughout Australia. Clear procedures and guidance for winding up of such funds should also be articulated.

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

We agree with the issues specified in the consultation paper regarding transitional matters, in particular the need for an effective educational campaign to raise awareness and understanding. However, we would suggest that charities, whether existing or newly registered, be given very clear instructions on registration regarding their self-assessment obligations and what is *practically involved* in self-assessment. It may be of utility to permit a transitional period of up to 18 months for existing charities.

Other points for consideration

The Core Definition – s 4(1)(e) of Charities Bill 2003 – ‘Serious Offence’

The section appears to have retrospective operation and captures a range of offences that, according to the section, would exclude an entity from being considered charitable. In circumstances in which an existing charitable entity has committed a serious offence (e.g., a breach of OH&S laws), or that an employee has been charged or found to have committed a serious offence (e.g., fraud), is it that the charitable status of the entity will be in jeopardy? Further, in its current form, it appears there is no requirement for actual conviction for a serious offence before the effect of the provision is invoked. Overall, the sub-section does not seem to achieve what we may assume was intended, that is, to exclude an entity that is engaged in illegal enterprises or, as a course of conduct, contravenes Australian law, or has been held to have committed a serious offence in which it is in the public interest for the entity to no longer be considered a charitable entity. We recommend that the sub-section be reviewed and amended significantly.