



# Submission re: A Statutory Definition of Charity, December 2011

The St Vincent de Paul Society National Council welcomes reform of the charitable sector. We hope that the future direction of charitable organisations' relationships with government is one of mutual respect, trust, accountability and collaboration.

The St Vincent de Paul Society is a respected charitable organisations operating in 142 countries around the world. In Australia we operate in every state and territory with nearly 50,000 members and volunteers committed to our work of social assistance and social justice. We are accountable to the people in our community who are living in poverty, are marginalised and disadvantaged by structures of exclusion and injustice. As such we want to emphasise that the reform process must begin and end with the interests of those who use charitable services in mind.

The Society works within a holistic framework. We deliver material, social, educational, emotional and spiritual support to the community and to our members and volunteers. Some of the issues we have with the definition of charity do not directly affect our own organisation, though they may affect other parts of the sector. No charitable organisation works alone and the interests of the people in need are best served by a diverse and vibrant community sector.

We are thankful to have moved a long way from the limitations to charitable advocacy that marred the 2003 Charities Bill.

We remain ambivalent about the idea of a public benefit test and the overturning of presumed benefit. We are unsure what exactly the public benefit test *per se* is testing. We also have concerns about the content and structure of the proposed public benefit test.

In light of these concerns and seemingly intractable complexity of a Public Benefit Test, we recommend the expansion of presumed benefit to all heads of charitable purpose outlined in the 2003 Charities Bill.

We have kept closely to the discussion questions, answering what we have the capacity to answer. We have not covered all of the ground possible or responded to all of the 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?**

St Vincent de Paul Society operates over 600 *Vinnies* stores across Australia. *Vinnies* stores serve multiple purposes- they provide affordable clothing and other household goods to the community at large, and free clothing and material assistance to those experiencing financial hardship. They create employment (including supported employment) and volunteering opportunities for people in the community. They also raise funds for the broader charitable work of the St Vincent de Paul Society. *Vinnies* stores also create an interface between the community and the St Vincent de Paul Society as a whole. Our ability to be innovative in the way we operate and use our *Vinnies* stores has been a considerable factor in our successful engagement in local communities, and our financial sustainability and independence.

We are cautious about the inflexibility “Exclusively Charitable Purpose” could entail, especially in the absence of any clear definition of what it might mean. It is crucial that the requirement of either dominant or exclusive purpose not create fetters on charities’ creative approaches to financial sustainability and service delivery. This is especially relevant given the growth of social enterprise in the sector. It is in both the sectors’ interests and the interests of government to encourage a diverse, flexible and innovative charitable sector to respond to changing economic and social conditions, community needs and expectations.

In Recommendation 3 of the 2001 *Report on the inquiry into the definition of charities and related organisations* states:

- i. *“If the entity has other purposes, those purposes must further, or be in aid of, the dominant purpose or purposes, or be ancillary or incidental to the dominant purpose or purposes.”*

We believe that this recommendation, made in light of 250 submissions to the inquiry, allows for flexibility while maintaining the integrity of charitable purpose.

**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?**

Peak bodies play a crucial role in furthering the charitable purpose of member organisations, and the charitable sector more broadly. *The Social Ventures Australia Limited v. Chief Commissioner of State Revenue [2008] NSWADT 331* decision is perhaps of limited use in clarifying the charitable status of peak bodies, especially in cases where the peak body primarily undertakes advocacy. We would like clarification on how the advocacy activities undertaken by peak organisations are considered in relation to charitable purpose.

Many charitable organisations lack the capacity to politically engage with issues that affect their work. Charities are affected both by policy that exacerbates the very problems charities exist to address and by policy that impedes their capacity to achieve their charitable aims.

Peak bodies may not only support their member organisations, but may be directed by their membership to undertake advocacy on policy issues that relate to members common charitable purposes. We contend that the role of a peak body in the charitable sector is not solely to secure the “viability of charitable organisations” but to contribute to the common purposes of charitable organisations, and to engage in sustained research, advocacy and policy development on behalf of member organisations and their purposes.

Under a statutory definition of charity based on the recommendations of the Charity Definition Inquiry 2001, a peak body whose purposes were included under its definition of “Advancement” (protection, maintenance, support, research, improvement or enhancement) would be deemed to be charitable, all other conditions being fulfilled.

This is an important principle, not only for so called “peak bodies” but also for the many charitable organisations that have charitable purposes closely akin to those of “peak bodies”. For example, the National Council of St Vincent de Paul Society is similar in many ways to a “peak body” in that its charitable purposes are the same as those of the State-based Societies of St Vincent de Paul, all of whom have charitable purposes, but it pursues its charitable purposes by coordinating, supporting and advocating on behalf of its member bodies at the national and international level.

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

The requirement for benefit to be directed to a “sufficient section of the general community” needs to be clarified. We take issue with the numerical logic underpinning this requirement especially in relation to severely marginalised, minority populations. The requirement to serve a “sufficient number” of people in the “general community” has the potential to:

- Create a bias against smaller, local community based entities favour of larger organisations that may not necessarily be able to deliver more *effective* services, but can deliver services to more people, or across more sites.
- Create bias against entities whose charitable work may be focused on the most marginalised, social excluded and multiply disadvantaged in the community. Entities may legitimately exist to benefit a relatively small number of people with specific, highly complex needs. To some, these people may be “numerically negligible” (subsection 7(2)). It is likely that their exclusion from the “general community” is precisely why they are in need of assistance from charitable entities.

The Board of Taxation Review of the 2003 Charities Bill, attempted to clarify the meaning of “sufficient section of the general community”. The review proposed that “sufficient section” be defined as one which is not “numerically negligible *when compared with the size of that part of the community to whom the purpose would be relevant.*”

This significantly alters the meaning of “sufficient section”. However, it is an unclear, circular and fairly ambiguous formulation that raises more questions than it clarifies- for example

- What are the presumed boundaries around “to whom it would be relevant”? Would this include only direct service recipients or also others who indirectly benefit?
- How does the “sufficient section” requirement apply to emerging services that may be targeting very hard to reach populations- it may take years for example to build trust to be able to work with significant numbers.

We recommend the “sufficient section of the community” requirement be overturned and replaced with the requirement that the benefit be directed to “the general community, or a section of the community with *appreciable and identified need.*”

**5) Could the term “for the public benefit’ be further clarified, for example, by including adding principles outlined in ruling TR 2011/D2 as contained in the Scottish, Ireland and Northern Ireland definitions or in guidance material of the Charities Commission of England and Wales?**

We would submit that the detailed explanation of the present state of the law in respect of the interpretation of “for the public benefit” as provided by the Australia Tax Office Draft Ruling TR 2011/D2 is evidence of the highly nuanced nature of the issue and demonstrates that it is probably best left to an examination of the circumstances of each case. Inclusion of more than general principles in the legislation is unlikely to be helpful as it will lead to increased levels of administrative review and litigation from those already endorsed as charities but who have to apply the new rules in their annual self-assessment.

The principles outlined in TR2011/D2 ruling provide a more nuanced view of the kinds of benefit arising from charitable work than the definition of public benefit provided in the discussion paper. For example:

- That charity is altruistic [this would include self-help groups] and intends includes social *benefit or value* (117)
- That the benefit or value is of worth, advantage, utility, importance or significance. (118)
- That value or benefit be either tangible or intangible. (118)
- The benefit cannot be harmful on balance. (119)

- Relevant factors in deciding whether a purpose is of sufficient value include community consensus, general notions of value and expert evidence. (120)

These principles acknowledge the diversity of charitable outcomes beyond simply material and practical assistance and the uncontested importance of benefit outweighing harm.

Paragraph 120 acknowledges that while community consensus may be enough to identify social value it is not necessary. This is important given the potential for stigma and popular prejudice to exclude and marginalise people and create the need for charitable intervention in the first place.

The TR2011/D2 ruling also includes principles that may be interpreted as being somewhat contradictory to the above- namely that benefit be “real or substantial”. We consider terms “demonstrable or identifiable” to be more inclusive of immaterial benefits.

In regard to the principle that the benefit “be at least for an appreciable section of the public” we echo our concerns as to the “sufficient section” above.

**6) Would the approach taken by England and Wales of relying on the common law and providing guidance on the meaning of the public benefit, be preferable on the grounds it provides greater flexibility.**

See our response to Question 5.

**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 2003 Charities Bill provided that to be a charitable entity, an entity must be for the public benefit and that it will have a purpose for the public benefit if it:

- Is aimed at achieving a universal or common good;
- Has practical utility; and
- Is directed to the benefit of the general community or to a sufficient section of the general community.

***What exactly is the public benefit test testing?***

We have some concerns as to the logic of the public benefit test being applied to entities whose purpose clearly fits under one of the seven heads of identified charitable purposes. Is the public benefit a test of *purpose*? Or a test of *activities*? It seems tautological to test the purpose of an entity who established for a recognised charitable purpose.

We submit that the courts’ traditional approach, to the assessment of whether a purpose is a charitable purpose or not, is sound. The traditional approach has been to make the

presumption that certain dominant purposes are charitable unless it can be established to the contrary or unless there is a disqualifying purpose present. Once a statutory definition of charitable purposes has been enacted a similar presumption can be made regarding the purposes listed. From an administrative point of view, this approach makes sense since it is simply impractical for regulators of charity in Australia to monitor all Australian charities to determine whether or not they are pursuing their dominant charitable purposes.

It is recommended that the best way to deal with the issue of possible breaches of the “altruistic” and “public benefit” principles by established charities is to establish a complaints process so that members of the public who have evidence of breaches of these principles can bring them to the attention of the regulator.

***Regarding the elements of the Public benefit test:***

**Has practical utility**

While the 2001 inquiry noted that practical utility can be broader than material benefits, it is still limited. If the phrase “practical utility” is stretched to include emotional and social support for example it ceases to retain much of a resemblance to the commonly understood meanings of the words “practical” and “utility” and continues to reflect an instrumentalist philosophy at odds with much community work.

While we are confident that our own organisation could fulfil this requirement easily (even if it was limited to material benefit), we also acknowledge that there are many aspects of our work that are equally as important but not simply of “practical utility” - emotional support, encouragement, social support, pastoral care, prayer, etc.

A holistic perspective on poverty, disadvantage and marginalisation informs much of our work. One example of how this is reflected in our work is the *Clemente* Program. *Clemente* is a tertiary level humanities course for people who have faced significant barriers to education due to severe, complex disadvantage. We have been involved in a three year ARC Linkage grant evaluating the outcomes for people in this program. The indicators of success for this program are not whether someone gets a job, enrolls in a full tertiary degree program, or if they have acquired “life-skills” in the usual sense. Rather, the benefits of the program are consequences of learning and becoming engaged in the world, of being included in discussions of the ‘big questions’ of society. The most significant impacts for participants in the *Clemente* program have been shifts in how they see themselves in the world, and an increased sense of agency. This is likely to play out in people lives in many different ways, over time. It may or may not lead to employment, further education, but it has a value in itself.

**Is directed to the benefit of the general community or to a sufficient section of the general community.**

Please refer to our response to questions 3 regarding “sufficient section”

**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?**

For existing charities, see our response to Question 7.

For entities applying to ACNC to be recognised as charities, ACNC will no doubt require details of the entity, its legal status, its objects, its governance structure, details of those who will control the entity and a description of its intended activities so that an assessment can be made of whether it complies with the principles and definitions.

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

The question of “practical utility” in the public benefit test presents an unduly complex requirement for religious and educational organisations to try and adhere to given the spiritual, reflective and intellectual benefits they produce are not simply of “practical utility”. These issues may apply to other charitable organisations, not only for religious and educational entities.

We recommend against removing a presumption of public benefit from the advancement of religion and the advancement of education for two reasons. First, such removal is likely to lead to interminable and unfruitful discussions about the spiritual and philosophical content of the religious and educational purposes rather than a focus on their overall effect on the well-being of the community. The presumption of public benefit of a wide range of religious and educational opportunities for the public contributes to the development of an informed, diverse, spiritual and thoughtful civil society. The testing of spiritual and educational purposes for their compliance with a test of public benefit presumes that there is such a standard.

A test of what is not in the public interest is much more likely to be a useful way of ensuring that conduct inimical to the public good is disqualified.

We recommend the presumption of benefit be applied to the expanded list of charitable purpose.

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

No, this is an appropriate expectation.

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

There is need for further clarification and distinction between activities and purpose. In some areas the distinction has been clarified, but not in others. For example, the distinction between purpose and activities needs to be clarified in the case of what the public benefit test is testing, and also in relation to dominant or exclusively charitable purpose. (See above).

**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?**

The AID WATCH decision was a significant move forward. We are pleased that the severe limitations on the political activities of charities as per the 2003 Bill are well and truly behind us.

In relation to the proposed revisions in paragraph 108 of the discussion paper, we are not convinced that there is a *need* to limit the political activities of charitable entities, though we are open to being convinced. If there is a significant problem in Australia of inappropriate political activity being undertaken by charitable organisations, and if we could be persuaded as to the benefits of placing limits on these activities, then we would happily accept limitations similar to those in place in England and Wales.

Namely, that “there is no limit on the extent to which charities can engage in campaigning in furtherance of their charitable purposes, political activity can only be a means of supporting or contributing to the achievement of those purposes, although it may be a significant contribution.”

We have concerns about the following part of the English and Wales Commission

“Hence, political activity cannot be the *only* way in which a charity pursues its charitable purpose.”

The impact of this depends largely on how broadly “political activity” is defined. In the England and Wales, political activity is defined as

***(2) Political activity: Political activity, as defined in this guidance, must only be undertaken by a charity in the context of supporting the delivery of its charitable purposes. We use this term to refer to activity by a charity which is aimed at securing, or opposing, any change in the law or in the policy or decisions of central government, local authorities or other public bodies, whether in this country or abroad...***

*Political activity might include some or all of:*



- *raising public support for such a change;*
- *seeking to influence political parties or independent candidates, decision-makers, politicians or public servants on the charity's position in various ways in support of the desired change; and responding to consultations carried out by political parties.*

Take for example a peak body that exists to undertake advocacy activities on behalf of charitable members-policy analysis, research, consultation, briefing members on policy changes and possibilities, educating members about policy changes and emerging issues in the social policy. Do these things all constitute “political activity” since the primary purpose of engaging in these things is to seek to influence policy makers in the interests of the charitable member entities and their purposes?

Does a community education campaign (for example about the stigma of poverty) that inadvertently or otherwise opposes current policy, constitute political activity?

If political activity was defined too broadly we would have concerns for peak advocacy bodies, entities that exist to promote civil rights through education and advocacy, and environmental organisations that are primarily research, education and advocacy based.

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

Charitable entities are ultimately accountable to the beneficiaries of their purpose. The political independence of charitable organisations is crucial for effective advocacy. We endorse prohibition against *party* political activities. It is appropriate that charitable organisations be able to endorse or oppose *policies*, but not politicians or parties.

We question the reference to “cause” part 2 section 8 (para 1.50) in the 2003 Charities Bill. All questions of social justice constitute a political “cause”. Charities should be permitted to engage politically with questions of social and environmental justice. To limit this would substantially diminish the right of charities to engage politically in the very issues they exist to address. We recommend the removal of the reference to “cause” altogether.

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

No. In principle we would submit that the legal nature of the entity in which the charity chooses to operate is irrelevant in determining whether or not an entity has charitable purposes, however, for administrative purposes, it may be necessary to specify a minimum set of attributes that the entity must have so that issues such as registration as a charity and tax administration can be effectively be pursued.

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

The Charities Bill 2003 defines ‘government body’ as meaning:

- (a) *The Commonwealth, a State or a Territory; or*
- (b) *a body controlled by the Commonwealth, a State, Territory; or*
- (c) *a government of a foreign country; or*
- (d) *a body controlled by the government of a foreign country*

It is our submission that the key to this issue is the extent to which the entity is controlled by government. The 2001 Charity Definition Inquiry Report recommended that, because there would always be level of uncertainty about the factors that will determine what degree of control will establish whether an entity is a government body, it is preferable to articulate the principles rather than prescribe detailed definitions. The 2001 Charity Definition Inquiry Report recommended that these uncertainties be resolved on the basis of the facts, on a case-by-case basis.

**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 purpose?**

Yes. We believe this is an appropriate list.

**17) If not, what other charitable purposes have string public recognition as charitable which would improve clarity if listed.**

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?**

It is recommended that the legislation introduced to the Parliament to give effect to a new statutory definition of charity be designed and titled to reflect its focus on charitable purposes rather than on charities.

## SUMMARY OF RECOMMENDATIONS

Our principal recommendations:

- The presumption of public benefit be applied to all charitable purposes listed in the 2003 Charities Bill and the *Extension of Charitable Purposes Act 2004*.
- That the advocacy role of peak bodies be clarified and not diminished.
- The reference to “cause” in 2(8):1.50 of the 2003 Charities Bill be removed.

We recommend against a public benefit test but if there *is* to be a public benefit test we would recommend

- That the requirement that a benefit have “practical utility” in the Public Benefit Test be revisited and replaced with something like “social value or utility”.
- That the numerical logic implied in the requirement that a charity benefit a “sufficient section” of the community also be reassessed in light of our concerns about extremely marginalised populations with complex needs.
- That there is clarification on what exactly the test is testing- e.g. purpose, activities, to what extent the entity is pursuing its purpose.