

8 December 2011

Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES ACT 2600

Email: NFPReform@treasury.gov.au

Dear Sir/Madam,

Re: Consultation Paper – A Definition of Charity

Thank you for providing Surf Life Saving Australia with the opportunity to respond to this Consultation Paper.

Surf Life Saving Australia (SLSA) is a registered charity, as are the surf lifesaving clubs and other entities that we represent nationally. SLSA is Australia's major water safety, drowning prevention and rescue authority. We are the largest volunteer organisation of our kind in the country. Our core activities are:

- Coastal safety and lifesaving
- Education and Training
- Fitness and sport
- Junior, youth and member development
- Organisational development

SLSA is the peak body for over 330 surf life saving clubs, regional and states centres and operational support units (including helicopter rescue services) throughout the country, and operates across all local, state and national jurisdictions. These clubs and entities are all separately incorporated organisations and all are registered charities (including ourselves). The continued operational viability of all of these entities is essential to providing a seamless lifesaving operation around the country.

SLSA commends the government for reintroducing this particular reform. Since SLSA's inception in 1907, its status as a charity has been defined by common law that dates back 300 years prior to establishment. By providing an Australian Statutory Definition, it will provide organisations such as ours with clarity and certainty regarding our status as a charity. It will also provide the flexibility for the government to keep up with the changing demands of Australian society. Further, SLSA believes that the alteration of other Commonwealth and State/Territory legislation is essential to providing a single definition across all jurisdictions. Without this, charities will continue to operate with multiple and sometimes inconsistent definitions and, as a consequence, varying compliance issues for charity related regulatory issues. This should be done as a priority.

Australian for life. 

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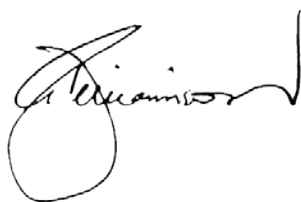
In crafting this definition, the government must ensure that a new statutory definition of charity must work to improve the regulatory environment for the not for profit sector to ensure the sector is better able to service the needs of the community. It must not impede the work of charities, and the government must ensure that this reform does not result in inefficient bureaucracy.

In the following, we have responded to each of the 20 questions posed in the Consultation Paper. In summary, we believe that the definition outlined in the 2003 draft legislation provides a solid basis. Further, there are a range of suggested changes outlined in the consultation paper that we support and others we do not. We have addressed our support and concerns. There are a range of additional changes which we feel would enhance the statutory definition. These are also outlined below.

In addition to the points raised below, we would like to also bring attention to the point made at clause 95 of the discussion paper. This clause states that '*The Government has accepted that a charity can undertake activities that are unrelated, or not intrinsically charitable, so long as those activities are in furtherance or in aid of its charitable purpose*'. SLSA believes that this statement is important and should be acknowledged either in the statutory definition or explanatory material. As stated throughout this submission, SLSA, its states, branches, clubs and other lifesaving services conduct a range of activities such as events, facility hire and sub leasing, etc, that in isolation may not be deemed to be charitable. All of these activities are however in aid of the charitable purpose either by providing fit and healthy lifesavers, through the raising of funds to support the activities of those lifesavers, etc. Such activities should not adversely affect an organisation's charitable status.

I trust that our feedback to the review will assist you in determining the best outcome for the statutory charities definition. If you have any questions in relation to our submission, please feel free to contact me on 02 9215 8050 or via email at bwilliamson@slsa.asn.au.

Regards,

A handwritten signature in black ink, appearing to read 'Brett Williamson', with a large, stylized flourish at the end.

Brett Williamson OAM
Chief Executive Officer
Surf Life Saving Australia


Also on behalf of:



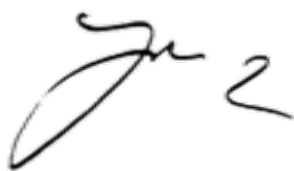
John Brennan
CEO
Surf Life Saving Qld



Phil Vanny
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Nigel Taylor
CEO
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Tony van den Enden
General Manager
Surf Life Saving Tas



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Paul Andrew
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Tony Snelling
CEO
Surf Life Saving NT



Steve Francia
Executive Director
Surf Life Saving
Foundation



Kris Beavis
General Manager
Northern Region SLSA
Helicopter Rescue Service



Stephen Leahy
CEO
Southern Region SLSA
Helicopter Rescue Service

Q1 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?

SLSA would be concerned if this change were to be adopted. SLSA’s preferred position is that the government retain the definition contained in the 2003 legislation where a charity must have a ‘dominant purpose’ which is charitable. The legislation further defined that an entity has a dominant purpose *‘if it has one or more purposes that are charitable, and any other purposes of the entity further or are in aid of, or are ancillary or incidental to the dominant purpose’*.

It is acknowledged that the suggested change would not alter the intent of the 2003 definition as the definition would continue to recognise other non-charitable activities that are incidental or ancillary to the charitable activity. Despite this, SLSA would be concerned about the perceived change in definition (i.e. dominant versus exclusive purpose).

As an example, SLSA conducts a range of sporting activities. These activities are designed to improve the fitness and skills of our members to undertake their charitable duties (i.e. saving lives). Other activities are held for the public for the purposes of raising valuable funds for our vital safety services. Similarly, our helicopter services conduct Search and Rescue operations under a fee for service arrangement with AusSAR and the Police. These activities reinforce and financially support the dominant charitable purpose of the service. While all of these activities might be seen as ancillary to or supporting our charitable purposes, one might argue that they are of themselves not charitable and hence our activities are not ‘exclusively’ charitable. We don’t believe that this is the intent of the definition and should be rectified.

Indeed, the current common law and Tax Ruling 2011/14 provides for entities conducting activities that generate a profit, attaining charitable status. The ruling articulates that if an entity’s sole purpose is charitable and it carries on a business or commercial enterprise to give effect to that charitable purpose, the entity may still have a charitable ruling. It also indicates that an entity can distribute surpluses to owners or members as long as the distribution of funds to its owners or members is in furtherance of its charitable purpose. This is an important clarification and should be identified in the statutory definition.

Furthermore the 2003 legislation (section 6) states that an entity will have a dominant purpose that is for the public benefit if *‘it has one or more purposes that are for the public benefit’*. Paragraph 1.31 of the Explanatory Material makes an important point in relation to this section, as follow:

“1.31 It may be that multiple charitable purposes for the public benefit, when taken together, form a dominant charitable purpose for the public benefit. Therefore, it is not necessary for an entity to show that a single purpose is their dominant purpose.”

We feel that this is an important point and, for the benefit of clarity, should be included in the final statutory definition.

SLSA also believes it is important to define peak bodies as charities within the statutory definition. As outlined in Question 2 below, we believe the decision of the

New South Wales Administrative Tribunal provides a sound basis for defining the charity status of peak bodies and should be included in the definition.

Q2 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?

This clarification provides enough certainty to define the support, guidance and mentoring roles required of peak bodies to have them recognised as Charities. This should be included in the final Charities Definition. SLSA feels it would also be appropriate to include indirect services such as ‘improving the efficiencies of, and supporting charities’.

Q3 Are any changes required to the Charities Bill 2003 to clarify the meaning of ‘public’ or ‘sufficient section of the general community’?

In the most part, SLSA believes that the public benefit definitions are sound. That said, we would like to raise the following discussion point:

Surf Club memberships – relationship to “public benefit”

The definition of “public benefit” in section 7 of the legislation requires that a purpose is only for the public benefit if, amongst other things, it is directed to the general community or to a sufficient section of the general community. Paragraph 1.38 of the Explanatory Material elaborates on this requirement by stating that any private benefits to members must be incidental to carrying out the charitable purpose. It further goes on to state that there can be provision of private benefits to members, but that the provision of these benefits must be incidental to the overall purpose of the entity.

As outlined in the preamble to this submission, the existence and nature of the club structure of SLSA is absolutely critical to the delivery of core services by the organisation. We are concerned that the interpretation of the “public benefit” be carefully considered when it comes to applying the final statutory definition. We recognise that there are benefits offered that attract members to join a surf club. It is the existence of these benefits (eg. access to club gyms, supporter clubs and other facilities) that in some instances are important considerations of individuals in their decision to join a club. However, it is critical to note the following:

- In the majority (if not all) cases, members will join a surf club for the primary purpose of directly or indirectly supporting the core life saving activities of the club’
- Without the ability to offer the incidental benefits of membership, most clubs would not be able to sustain a critical mass of people or funding to continue the core operations of the club.

In summary, we therefore recommend that the ACNC give reference of the above issue in determining whether the “public benefit” test is met.

Q4 Are changes to the Charities Bill 2003 necessary to ensure beneficiaries with family ties (such as native title holders) can receive benefits from charities?

SLSA believes that entities which meet all other characteristics of a charity should not be excluded from charitable status because its potential beneficiaries are required to be part of the same family group.

Q5 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?

SLSA believes that further clarifying the term 'for the public benefit' in the ways suggested would result in a complicated result and hence should not be undertaken.

That said, we would like to encourage the government to consider the inclusion of altruism to the public benefit test.

Recommendation 7 of the *Report of the Inquiry into the Definition of Charities and Related Organisations* released by the government in August 2001 ("the Charities Report") states '*That the public benefit test be strengthened by requiring that the dominant purpose of a charitable entity must be altruistic*'.

The Charities Report goes on to define altruism as 'unselfish concern for the welfare of others' and further states that 'in the context of charity, altruism can also be characterised as a voluntarily assumed obligation towards the wellbeing of others or the community generally.' In a SLSA context as an example, this would include the saving of life through direct intervention in varying weather conditions and hazards, the risk of which is to some extent mitigated by the extensive training, equipment and operating procedures in place.

This addition to the definition of public benefit would certainly clarify the meaning. Further, we note that the Charities report gives an example of an organisation providing a benefit to the public without necessarily acting altruistically. We believe that the intent of the statutory definition would be to prevent such organisations as being recognised as charities.

Accordingly, we believe that the inclusion of altruism in the public benefit test could potentially lead to a narrowing of the definition of "charity" and believe that this should be added to the meaning of public benefit.

We believe that this addition should be made provided that the public benefit test continue to operate on the basis that it is the entity's dominant purpose that must be for the public benefit. That is, ancillary and incidental activities which may not be offered altruistically will not otherwise affect an entity's charitable status.

Q6 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?

No. If the intention of statutorily defining charity is to avoid a reliance on common law interpretations and provide for some certainty, any reliance on the common law in the future should be avoided, to minimise the time and money spent in the courts trying to clarify any part of the definition via the common law.

Q7 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 major issues with this requirement are the added time (and potentially cost) burdens that this would place on organisations. In our experience, charities do not have too much spare capacity amongst its personnel (who are often volunteers) to undertake tasks such as defining and justifying their public benefit. If assistance could be provided to such organisations, we believe this would reduce the burden.

Clause 82 of the discussion paper, states that an organisation would not be required to demonstrate their public benefit if that benefit was self-evident. This philosophy is important as it will reduce the burden for many organisations.

Q8 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?

As stated above, we believe that it is essential that assistance be provided to organisations in helping them demonstrate their public benefit if it is not obvious. The ACNC appears to be the most logical body to be tasked with this service.

We note that the ACNC will also operate as a regulator to the industry. As such, we appreciate that the organisation needs to ensure that there is not a conflict of interest between their advisory services and their regulatory services. This can be overcome via some simple administrative systems.

In terms of the ongoing monitoring of the charitable status of the organisations, this should be simply built in to their regulatory/audit services on the sector.

Q9 What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?

Those organisations would lose their charitable status and associated benefits. This is no different to any other organisation that would lose its status if it were found not to be for the public benefit.

Q10 Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?

No. It is important that not only the organisation's objects (i.e. constitutional definition of its purpose) but also its actions are used to determine its charitable

status. If this view is adopted however, it further strengthens the need for dominant purpose to be retained and carefully monitored (note Question 1). An organisation may undertake a range of activities that are either themselves charitable or are in aid of charitable activities. SLSA's sports are for example in aid of skilling our lifesavers. Surf clubs often hire out their facilities to source vital revenue that will enable them to undertake their lifesaving duties. In isolation, these activities are not charitable, but they are supporting the dominant purpose of the organisation which is to save lives – which is charitable. Such activities must not affect the charitable status of such organisations.

Q11 Should the role of activities in determining an entity's status as a charity be further clarified in the definition?

Yes, but only if the issues raised in Question 10 above can also be resolved in the definition. The government may find this difficult to include in a broad generic definition and may prefer to include this in each organisations charity accreditation status.

Furthermore, SLSA suggests clarifying this using paragraphs 30 and 31 in TR 2011/4:

Finding Purpose

30. The enquiry as to purpose is a holistic one. It is the substance and reality of the institution's purpose that must be determined.

31. The objects or objectives in the constituent documents of an institution, and the activities by which those objects or objectives are achieved, are the main factors to be considered in determining the purpose of the institution.

Q12 Are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

In order to reflect the recent common law changes which have allowed for charities to advocate for government policy changes, it would be appropriate to allow for such changes in the statutory definition of charity.

Q13 Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

No. The support and advocacy of political parties, whilst important, is not charitable in the community's eyes. As an example, SLSA and its affiliates all explicitly note that they are non-political organisations.

If the government adopts the inclusion of a test of altruism in its charities definition, there would be no need to explicitly exclude political advocacy.

Q14 Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?

No. We believe that there is enough clarity in this definition to preclude organisations (i.e. individuals, political parties, superannuation funds and government bodies) whilst still providing enough flexibility to provide the most appropriate legal structure of the organisation.

Q15 In the light of the *Central Bayside* decision is the existing definition of ‘government body’ in the Charities Bill 2003 adequate?

We do not believe so.

The term “government body” is defined in section 3 of the draft legislation. This definition states, inter alia:

“**government body** means:

- (a).....; or
 - (b) a body **controlled** by the Commonwealth, a State or a Territory; or”
- (our emphasis)

Paragraphs 1.18 to 1.24 of the Explanatory Material discuss the concept of “government control” for the purposes of this component of the core definition. This is an area of great concern to SLSA given the increasing extent of government involvement within various areas of the organisation. In particular, the increasing recognition by government of surf life saving as an “emergency service” has brought a new dimension to the involvement by government in the core activities of the organisation. Amongst other things, this has meant recognition in some Australian states of surf life saving in the respective pieces of emergency services legislation and has also formalised in a new way the manner and mechanics of government funding to the organisation.

The organisation is keen to stress that the “government control” element of the definition of charity not be interpreted so broadly that formal government recognition and funding along the lines mentioned above would be sufficient to exclude the organisation from the definition of charity on the basis it would be considered a “government body”. In particular the organisation is concerned about the contents of paragraph 1.20 of the Explanatory Material regarding funding through a government imposed levy and the “carrying on of activities at the government’s instruction”.

This is particularly important in the conduct of some of our Helicopter Rescue and Lifeguard Services. Given the finding in *Mines Rescue of NSW v CT*, it could be argued that both of these services could be classed as Government Bodies as the continuation of their service contracts for these organisations are driven by Government.

In support of the organisation’s view that it is not controlled by government and therefore not a government body, the following points (in reference to comments made at paragraph 1.22 of the Explanatory Material) are made in relation to the organisations operations at present:

- Government does not have the ability to approve appointments or remove appointments from the Boards of the organisation.
- Government does not have the ability to overturn decisions of the Boards of the organisation.

More importantly, it is critical to note:

- the key operations of the organisation have not changed as a result of the increased involvement of government – this is not a situation of new or increased government regulation which has led to the introduction of new services;
- the organisation has, for 104 years, and will continue to offer its (largely volunteer) life saving and associated services;
- the methods of service delivery are typically unaltered as a result of the new arrangements with government compared to the service delivery provided before;
- typically, governments only provide partial funding for life saving activities of the organisation;
- typically, governments could change their mind at any time regarding the extent of recognition and level of funding delivered.

In conclusion, we recommend that the statutory definition be amended to exclude as a “government body” those types of entities which fall within the broad parameters of the points outlined above.

Q16 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 believe that the list of charitable purposes are sound, however we would encourage the government to further expand on the definition of 10(1)(g) ‘any other purpose that is beneficial to the community’ in the same way that 10(1)(c) and 10(1)(d) are further expanded in the current version of the draft legislation.

SLSA acknowledges that this clause provides effective flexibility for the government to keep up with the changing demands of Australian Society. That said, we believe that the statutory definition would benefit from some additional guidance as to what constitutes such other purposes. SLSA supports the inclusion of an additional clause that reflects 1.84 of the Explanatory Material which states:

‘The following are examples of some of the types of purposes that will fall under ‘other purposes beneficial to the community’

- *the promotion and protection of civil rights’*
- *the promotion of reconciliation, mutual respect, tolerance between various groups of people within Australia;*
- *the protection and safety of the general public; and*
- *the prevention and relief of suffering of animals.’*

We would also support the addition of the following extra dot point:

- the rescuing of persons from peril for their personal safety

Q17 If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

Other than the inclusion of the clause identified in Question 16, SLSA believes that the list is sound.

Q18 What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?

SLSA strongly supports a single statutory definition of 'charity' across all Commonwealth, State and Territory jurisdictions.

SLSA believes that the Charities Bill draft, with the associated amendments discussed in the paper and commented on in this submission, are sound in setting the platform for harmonised charities definitions.

In relation to other laws, it would be advisable that such a review be undertaken as a separate exercise to this task, and that a complete audit of existing Commonwealth and State/Territory legislation that exists that either references charities and/or defines charities. This would enable a greater understanding of the scope of changes required.

The pieces of Commonwealth legislation that should be considered as a matter of urgency are those relating to Taxation Benefits (i.e. Fringe Benefits Tax Assessment Act 1986, A New Tax System (Goods and Services Tax) Act 1999 and Income Tax Assessment Act 1997). These acts should be reviewed and ensure that their definitions align with (or reference) that of the statutory definition. These acts also confer some benefits on public benevolent institutions, which may be something that the government wishes to define further as is recommended in the 2001 Charities Inquiry.

In suggesting the above review, SLSA would urge the government not to alter its current taxation policy in relation to recognised charities. Charities rely on the tax concessions afforded to them under these acts and would find it difficult to raise funds and provide sufficient staff incentive to operate effectively.

Q19 What are the current problems and limitations with ADRFs?

SLSA does not have any experience at dealing with ADRF's.

Q20 Are there any other transitional issues with enacting a statutory definition of charity?

The major transitional issues will be the requirement for organisations to justify their charitable purposes and public benefit. As stated previously in this submission, the assistance of an external body, possibly the ACNC, would greatly enhance the ability for organisations to transition to this new arrangement.

In implementing a formal public benefit test, it is also important to ensure the government introduces a streamlined process to minimise time and financial pressures on charities that may already be stretched. A reasonable transition period should also be considered for charities to report on their status.