

Tasmanian Treasury Submission

Submission in response to Consultation Paper on 'A
Definition of Charity'

9 December 2011



Tasmania
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Introduction

The Tasmanian Department of Treasury and Finance welcomes the opportunity to provide a submission in response to the consultation paper published by the Commonwealth Treasury in October 2011 on 'A Definition of Charity'.

The Department acknowledges that there are significant benefits to the not-for-profit sector that may arise from this national reform agenda, particularly if the States and Territories can agree on a harmonised approach to taxation of the sector.

The establishment of a national regulator for the sector will simplify the administration of taxing the not-for-profit sector and provide certainty to the both the sector and State and Territory revenue departments.

This submission addresses the questions posed in the consultation paper in turn. The submission is not confidential.

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?

There is no issue with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose. The proposed amendment creates an absolute; the 'dominant purpose' test is open to interpretation (for example: if a NFP entity directs 51% of its activities towards charitable activities, which could be interpreted as being the entity's 'dominant purpose'). A change in the definition to a 'sole' or 'exclusive' purpose creates certainty for the regulator and the NFP sector.

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?

The decision in *Social Ventures Australia Limited v Chief Commissioner of State Revenue* provides sufficient clarification about the circumstances where a peak body can be a charity. Further clarification is not required at the present time; however, it may become necessary in the event that the *Word Investments* case is used as a precedent in future litigation.

3 Are there any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the community'?

There would appear to be no changes that should be made to the Charities Bill to clarify the meaning of 'public' or 'sufficient section of the general community'. 'Public' is a word that has a widely and commonly accepted meaning.

As to the definition of 'sufficient section of the general community', there could be scope to qualify the term 'general community' to recognise that there are specific groups of people that form what could be considered a 'general community'—for example, a group of people with shared, specific religious, cultural or philosophical beliefs might be characterised as a 'general community'; a 'sub-group' general community within the broader population.

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?

Given that Australia has an identifiable population of indigenous people, as well as other people such as refugees who may share blood ties, the Charities Bill might be amended, along the lines of the New Zealand amendment, to ensure beneficiaries with family ties can receive benefits from charities.

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 definition or in the guidance material of the Charities Commission of England and Wales?

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?

There is merit in both approaches suggested in these questions as the question of whether an entity’s activities are ‘for the public benefit’ requires a subjective assessment of the entity’s activities and purposes.

Incorporating the additional principles outlined in TR 2011/D2 or including a comprehensive list such as is contained in the Irish legislation would provide clear, added guidance as to the nature of activities considered to be for the public benefit.

The guidance material in the English, Welsh, Scottish and Northern Ireland legislation all require a consultative process, which would appear to be somewhat burdensome to administer. This approach is not likely to be the best option to deal with this issue.

Given that the purpose of the NFP reforms is to provide certainty to government and the NFP sector about the definition of ‘charity’ in its entirety, it would seem that favouring a non-statutory approach to the issue of ‘for the public benefit’ and, instead relying on common law and overarching guidelines is counter intuitive. While it may provide for greater flexibility in interpretation, this approach has the potential to reduce certainty and clarity, which would be contra to the scope of this reform project.

To increase the flexibility of a statutory definition of ‘for the public benefit’, a provision such as “any other purpose of an entity that may reasonably be regarded as analogous to any of the preceding purposes” could be included in the legislation. This would allow for the definition to apply to any new public benefit purposes that may arise as a result of judicial determinations.

Despite the findings of the 2001 Charities Definition Inquiry, the requirement that the purpose of an entity must have ‘practical utility’ to be of public benefit may unintentionally narrow the scope of the definition if it is applied strictly to the letter of the law. It would appear that amending the Charities Bill to remove this requirement would not substantially alter the public benefit test.

7 What are the issues with requiring an existing charity or entity seeking approval as a charity to demonstrate they are for the public benefit?

The issues associated with requiring an existing charity or an entity seeking approval as a charity to demonstrate that they are for the public benefit are primarily compliance costs. However, as noted in the consultation paper, in some instances the public benefit may be self-evident; in other instances, charities have already been required to review their activities and purpose to ensure they remain charitable.

Charities are already under an obligation to notify relevant government authorities if they consider they are no longer assessable as charitable. As such, there should be little in the way of increases to compliance costs incurred by an entity in demonstrating that it is for the public benefit.

8 What role should the ACNC have in providing assistance to charities in demonstrating this test, and also ensuring charities demonstrate their continued meeting of this test?

The ACNC's role in providing assistance to charities in demonstrating the public benefit test should be limited to a guidance role only. Information about what sort of evidence will satisfy the ACNC that an entity meets the public benefit test could be made available on the public information portal that the ACNC is required to establish, as well as through the ACNC's role of providing education and support to the NFP sector on technical matters.

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

There will only be issues for entities established for the advancement of religion or education if the presumption of benefit is overturned if the entity cannot demonstrate a public benefit. An entity that has been approved as a charity will be at risk of losing that status if it can be shown that its activities are causing significant detriment or harm to its members. As noted in the consultation paper, overseas experience shows that overturning the presumption of public benefit for the advancement of religion has not resulted in any particular difficulties for most religions. The ACNC may wish to consider providing examples of these overseas experiences through its information dissemination programs.

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

There appear to be no issues associated with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose. This requirement has been judicially determined in the *Word Investments* case and the legislation should reflect the common law position.

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

The core definition of a charity in the Charities Bill includes the requirement that the entity does not engage in activities that "do not further, or are not in aid of, its dominant purpose". This prohibition adequately reflects the decision in *Word Investments* and should not require amendment or clarification.

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?

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

There are no issues with either of the suggested changes. The first change reflects the decision in the *Aid/Watch* case and the second change continues the accepted practice of prohibiting a charity from advocating for a political party, or supporting or opposing a candidate for political office.

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

Clarification should be provided to specifically define the types of legal entity that can be used to operate a charity. This could be provided in the explanatory material to the definition so as to provide clear guidance to the ACNC about the entities that the government intends to be defined as charities. This information should also be disseminated by the ACNC through its information sharing programs.

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

The current definition of 'government body' is somewhat inadequate. A definition such as the definition of 'government entity' contained in the *A New Tax System (Australian Business Number) Act 1999* would be preferable as it clearly sets out what a government entity is. The definition would need to include the government of a foreign company (to reflect the definition contained in the Charities Bill) and also be clear about whether or not local government is included. On the basis of the decision in *Central Bayside* it would appear that, currently, local government would not be considered a government body for the purposes of the Charities Bill.

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?

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

The list of charitable purposes in the Charities Bill and the *Extension of Charitable Purposes Act 2004* could be made more comprehensive for reasons of certainty (see for example the lists contained in the legislation of Scotland and Northern Ireland). The list of entities proposed as falling under the 'other purposes beneficial to the community' in the consultation paper should be included in the list prescribed in the legislation.

Similarly, as TR2011/D2 has identified specific activities that have been found to be not charitable, these should be included in the list of disqualifying purposes (with the exclusion of the reference to sporting as there are some instances where sporting activities may be a charitable purpose) to provide certainty to the regulator and the NFP sector.

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

Once the Charities Bill has been settled and passed into law, the process of harmonising the definition of 'charity' and 'charitable purpose' with Tasmanian legislation will be relatively easy. The term 'charity' appears in twelve statutes; however, none of the statutes contain a definition of the term. The Tasmanian legislature may either choose to adopt the Commonwealth's definition of 'charity' as is, or in a form adapted for Tasmanian needs.

The term 'charitable purpose' appears in 27 statutes and is inconsistently defined in only two of those statutes. Again, the Tasmanian legislature may either choose to adopt the Commonwealth's definition of 'charitable purpose' as is, or in a form adapted for Tasmanian needs.

19 What are the current problems and limitations with ADFR's?

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

The consultation paper addresses these questions.