

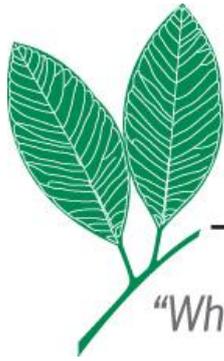
# **SUBMISSION COVER SHEET**

**(not for publication)**

## **A Definition of Charity and Charitable Purposes**

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# THE AUSTRALIAN LUNG FOUNDATION

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*"When you can't breathe...nothing else matters"™*

**Submission by The Australian Lung Foundation  
to  
The Treasury**

**Comment and views on the form of:  
A Statutory definition of charity and charitable  
purposes**

8 November 2011

The Manager  
Philanthropy and Exemptions Unit  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Dear Sir,

### **A statutory definition of charity and charitable purposes**

Thank you for the opportunity to provide comment and views on the form of a statutory definition of charity and charitable purposes, included in the Consultation Paper issued in October 2011 entitled "A Definition of Charity".

#### **Introduction and Background**

The Australian Lung Foundation is an incorporated not-for-profit organisation which does not receive any ongoing government funding for its core operations. Activities are financed by fundraising activities, donations and bequests. With representation in each State and Territory, we have in the region of 15,000 households who we endeavour to support: through our activities as the only not-for-profit charity devoted to serving everyone in Australia with a lung disease and to contribute to the search for a cure.

The activities of The Australian Lung Foundation include efforts to:

- promote lung health;
- elevate public awareness of the symptoms of lung disease;
- promote early diagnosis;
- provide support for all those affected by lung disease;
- advocate for further research and screening for lung disease; and
- sponsor medical and scientific research into lung disease.

We submit our comments and views on the issues that we believe need to be considered regarding the form of a statutory definition of charity and charitable purposes.

#### **Statutory Definition**

While we generally support the Government's position that there is a need for a statutory definition of "charity" and that the current definition can be unclear and confusing, we also recognise that there is a considerable body of law that has built up around the definition of 'charity' and this does offer some clarity. Clearly any new definition will create uncertainty as the various arms of the new legislation are tested in the courts.

In our view it would have been helpful if the Consultation Paper had included ideas on a definition for our consideration.

#### **Options for Improving Efficiency**

The 2008 Senate enquiry recommended a Single National Agency to regulate the entire sector. We believe that it would be difficult to regulate all of the 700,000 organisations in the Third Sector here in Australia. The UK has introduced a Charities Commission; however this would not necessarily work well in Australia, as a minority of the not-for-profit organisations are in fact charities.

- There are currently approximately 34 ways in which a not-for-profit organisation might qualify for tax exemption. However, only two of these relate to qualifying as a charity;
- There are currently approximately 47 means of being granted a Deductible Gift Recipient status for not-for-profit organisations.

Clearly, there are opportunities for streamlining the application processes and thus improving efficiency all-round

As foreshadowed above, we believe that it would be too onerous to regulate all 700,000 not-for-profit organisations, but a single regulator could identify different levels of activity in the organisations and possibly differentiate those who are delivering public services on behalf of the government from the rest of us who are reliant on fundraising and bequests.

### **Public Benefit and Charitable Purposes definition**

From our understanding of the Consultation Paper organisations seeking charitable status can now be required to demonstrate "public benefit". Our collaborators at the British Lung Foundation inform us that there is such a requirement in the UK which has led to a good deal of controversy and litigation.

It is our strong view that the concept of public benefit should be broadly defined, unlike the England and Wales situation. This will help reduce potentially onerous compliance costs for charities to demonstrate that they indeed provide a public benefit.

As the law stands in Australia there is a presumption that an organisation established for the promotion of education or religion or for the relief of property is for the public benefit. As such the onus is on the Australian Tax Office and after 1 July 2012 of the new Australian Charities and Not- for- profits Commission (ACNC) to rebut that presumption. We would urge government to maintain the rebuttal presumption in future legislation.

The Australian Taxation Office released Taxation Ruling TR 2011/4 in October this year. We believe this ruling has been helpful as it both dovetails a number of legal decisions and expands on the ATO's view on charitable purpose. The ruling has assisted The Australian Lung Foundation in its regular task to determine whether our circumstances satisfy the definition of "charitable". Our hope is that any changes to this "interim" definition of charity and other not-for-profit changes are reflected in the new legislation and are in step with the ATO ruling.

### **Detailed Responses to Consultation Questions**

In the interests of completeness we set out at Appendix 1 our detailed responses to the Consultation Questions set out in the paper.

Thank you for the opportunity to make this submission and we wish you well in your endeavours.

Yours sincerely

A handwritten signature in black ink, appearing to read 'William Darbishire', with a long horizontal line extending to the right.

William Darbishire  
Chief Executive Officer

## **The Australian Lung Foundation Detailed Responses to Consultation Questions**

### **Q1**

**Issues with amending the 2003 definition to replace the "dominant purpose" requirement with the requirement that a charity have Annex elusively charitable purpose?**

**A1** Providing the list of charitable purposes is expanded (in line with the listing developed by other jurisdictions), then the move to the requirement that a charity have an exclusively charitable purpose.

HOWEVER there needs to be a definition included in the legislation to provide guidance as to what "incidental or ancillary to the charitable purpose" would mean for a purpose that is not charitable in nature (similar to NZ item 5:4)

### **Q2**

**Does the decision by the New South Wales Administrative Tribunal provides sufficient clarification on the circumstances where the peak body can be a charity or its further clarification required?**

**A2** We believe that the entitlement of peak bodies which support other charitable organisations to be endorsed themselves as charitable organisations need to be protected. Were their purposes and activities support charitable purposes then they should be entitled to endorsement as a charity, even though they may not deal directly with members of the public.

### **Q3**

**Are any changes required to the Charities Bill 2003 to clarify the meaning of "public" or "sufficient section of the general community"?**

**A3** We agree with the Board of Taxation that a "sufficient section of the general community" be defined to take into account the diversity in size of groups to whom a charity might be relevant.

### **Q4**

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

**A4** The NZ legislation specifically mentions the Maori example. If there are situations in Australia, where there are certain instances of family ties that need to be specifically mentioned, then that should occur.

### **Q5**

**Could the term "for public benefit" be further clarified, for example, by including additional principles outlined in a ruling TR 2011/82 et al.?**

**A5** Clause 11 in the Irish legislation provides guidance as to how the base level of public benefit should be defined in the legislation. As mentioned above a provision should also be included that allows the ACNC to provide further guidance and clarity on this matter.

### **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?**

**A6** From our understanding of the Consultation Paper organisations seeking charitable status can now be required to demonstrate "public benefit". Our collaborators at the British Lung Foundation inform us that there is such a requirement in the UK which has led to a good deal of controversy and litigation.

It is our strong view that the concept of public benefit should be broadly defined, unlike the England and Wales situation. This will help reduce potentially onerous compliance costs for charities to demonstrate that they indeed provide a public benefit.

#### **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?**

**A7** There should not be too many issues with requiring an existing charity to demonstrate that they are for the public interest as many current charities are already demonstrating this through information that they are providing to their stakeholders (Annual report, info brochures, education days, guidelines etc).

New entities seeking to become charities should be able to demonstrate as part of their application that they are for public interest. Having done this, then it will only be a matter of maintaining the ability to demonstrate. As the law stands in Australia there is a presumption that an organisation established for the promotion of education or religion or for the relief of property is for the public benefit. As such the onus is on the Australian Tax Office (and after 1 July 2012 of the New Australian Charities and Not-for-profits Commission (ACNC)) to rebut that presumption. We would urge government to maintain the rebuttal presumption in future legislation.

#### **Q8**

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

**A8** The role of the ACNC should be similar to that being currently fulfilled by the ATO with the provision of worksheets, guidance notes (including examples of what is being considered), free public seminars, provision of “no fault” initial consultancy so that charities are encouraged to seek the assistance of the ACNC to rectify issues that may be applicable to their entity.

#### **Q9**

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

**A9** It is interesting that Ireland is the only jurisdiction that has maintained the presumption for religion (possibly plenty of "political oxygen" in the Catholic Church?). The majority of religious entities are of sufficient size to maintain a large administrative function that would be able to absorb the cost of a requirement to demonstrate that they are for public interest. As identified in the consulting paper, once the initial cost is done, it would cost little to maintain. It could certainly identify some religious charities that should not be charities due to the public harm.

#### **Q10**

**Are there any issues with the requirement that the activities of each entity be in furtherance or in aid of its charitable purpose?**

**A10** Clearly there are many ways that a charity should be allowed to achieve its charitable purpose, and as such the definition should allow activities if they can be shown to in furtherance of its charitable purpose.

#### **Q11**

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

**A11** The Irish definition of charity requiring that all of its property (both real and personal) be directed in furtherance of the charitable purpose is very succinct. We would expect that guidelines and worksheets to be developed by the ACNC would provide further clarification on the role of activities in determining an entity's status as a charity.

#### **Q12**

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

**A12** Following the High Court's decision in Aid/Watch, political purpose can be considered charitable if it generates public debate with a view to influence legislation, government activities or government policy in respect of one or more of the four categories of charity. We support the proposed changes to paragraph 8(2)(c) that would allow charities to undertake political advocacy in furtherance of their charitable purpose. This could be supported by guidelines issued by ACNC (that would be similar in nature to NZ guidelines) that provide examples of the types of political advocacy that can be undertaken by a charity.

We consider that no changes are required to paragraphs (a) or (b) other than to remove the word “cause” or insert the word “political” in front of the word “cause” in paragraph (a) to remove any ambiguity

### **Q13**

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

**A13** We do not see any particular issues with prohibiting charities from advocating a political party or supporting or opposing a candidate for political office. To remove the prohibition could compromise the independence of charities and erode public confidence in charities. It would possibly cause the focus of some charities to be "hi-jacked" away from their charitable purpose.

### **Q14**

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

**A14** We harbour concerns about the number of charities that are not incorporated entities. With the establishment of the ACNC, the opportunity could be taken to have all charities incorporated under Federal legislation rather than separate state legislation, with differing levels of reporting requirements depending on the size of the charity (which could be measured in a number of ways). These differing levels could reflect what is currently required under the legislative requirements around our Nation or could be adjusted to ensure a level of fairness, particularly to the smaller charities.

### **Q15**

**In light of the *central bayside* decision is the existing definition of "government body" in the Charities Bill 2003 adequate?**

**A15** We note the ATO's view following the recent *central bayside* decision where the sole purpose of an institution is charitable, neither the fact that its services have the effect of helping to achieve government policy objectives nor the fact that it relies heavily on government funding will detract from it being characterised as charitable.

The definition of "government body" in the Charities Bill 2003 should be adjusted to reflect the Central Bayside decision, rather than have it clarified further in the explanatory materials. Not changing it infers that there is an expectation that the law is going to be changed in the short term,

### **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?**

**A16** We believe it would be worthwhile giving consideration to inclusion of wording included at paragraph 11 of Part 1 of the Ireland legislation, as a listing of charitable purposes. We believe also that the current list is not comprehensive enough. The third sector needs certainty about what is a charitable purpose, legislation that contains ambiguity as to what a charitable purpose is will cause confusion and additional costs.

**Q17 Refer paragraph 11 in Part 1 of the Ireland legislation**

### **Q18**

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

**A18** covered in our answers above

### **Q19**

**What are the current problems and limitations with ADRFs**

**A19** As demonstrated in the wake of the disastrous Victorian bushfires in 2009 and the Queensland Floods 2011 there are clearly problems with and limitations in the current administration of **ADRFs**. As foreshadowed in the consultation paper some flexibility needs to be introduced into the current charitable framework to assist guidance on how donated funds can be applied.

### **Q20**

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

**A19** At the moment, a charity that has a national presence is required to register as a charity in each State under their respective Collections legislation. It would be highly beneficial if this could be controlled through one controlling body. This would remove a large amount of red tape that we are currently experiencing