



# A Definition of Charity

Submission by UnitingCare Australia

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## 1. Introduction

UnitingCare Australia is the Uniting Church's national body supporting community services and advocacy for children, young people, families, people with disabilities and older people. The Uniting Church's commitment to community services is an expression of the Christian vision of inclusion and equality of opportunity for all people and communities regardless of age, gender, sexuality, ability, class, colour, creed or cultural origin.

UnitingCare Australia takes up community service issues within the theological framework of the Uniting Church, particularly the Church's social justice perspectives. We develop and reflect on the policies and practices of the Uniting Church in community services. We pursue appropriate issues within the Uniting Church, with Government and the community sector, and with the Australian community.

UnitingCare Australia represents the network of UnitingCare community services operating nationally across more than 1300 sites. The UnitingCare network is one of the largest providers of community services in Australia providing services to 2 million Australians each year, with an annual turnover in excess of \$2 billion a year, employing 35,000 staff and 24,000 volunteers nationally.

UnitingCare provides services to children, young people and families, people dealing with deprivation and hardship, people with disabilities, Indigenous and older Australians living in urban, rural and remote communities. Services delivered by UnitingCare agencies employ a holistic approach to supporting individuals and communities to access the resources, supports and opportunities needed to live a decent life, the building blocks of which are being able to access appropriate food, clothing and healthcare; safe and secure housing; meaningful work, education, rest and enjoyment; and the opportunity to participate in and contribute to communities. UnitingCare agencies, through their community linkages are also able to provide people of goodwill – either as individuals or as organisations – a vehicle to make their own contribution to improving the wellbeing of people and communities that are disadvantaged and vulnerable. We partner with governments, other organisations, communities and people of goodwill to ensure all people have access to the means and opportunity for a decent life.

Restating the definition of charity in legislation is an important foundation for the broader not for profit reform agenda. A statutory definition of charity has the potential to provide greater clarity and certainty for the sector. With this greater clarity and certainty we would hope to see a commensurate reduction in unnecessary and complex red-tape for entities seeking charitable status. It is our hope that a well constructed statutory definition of charity will enable the Australian Charity Not for Profit Commission (ACNC) to carry out its regulatory function in a manner which is efficient, effective and transparent so that charitable entities can focus their scarce human and financial resources toward the provision of services to vulnerable and disadvantaged Australians. It is through this lens we wish to comment on the proposal to introduce a statutory definition of charity.

## 2. Principles

The current meaning of charity and charitable purpose is largely defined at common law, which has developed over 400 years. It has generally served the community well however a number of reviews and inquiries over the years have recommended that the common law meaning of charity be restated in legislation.

While UnitingCare Australia supports, in principle, the move to establish a statutory definition of charity there are some important principles which we think should guide its development and implementation. The first principle is that this reform addresses the actual weaknesses of the current arrangements but not at the expenses of its strengths. The second is that the introduction of a statutory definition of charity should not result in an increase in administrative or regulatory burden on the sector.

## 3. Key Issues

UnitingCare Australia believes that consideration of the introduction of a statutory definition of charity should be based on work done during 2001 Charities Definition Inquiry and subsequent Charities Bill 2003, supplemented by the key contemporary legal decisions and legislative amendments which now define charity law in Australia. Our submission does not seek to address each of the issues raised in the discussion paper but rather focuses on those issues which would most directly affect UnitingCare agencies, namely the Public Benefit Presumption and Test, Advocacy, Peaks and Charity infrastructure entities.

### 3.1 Public Benefit Presumption

Under common law, entities within the first three heads of charity are presumed to be providing a public benefit. In other words that entity is not required to prove it is providing a public benefit. As is outlined in the discussion paper where a presumption of public benefit exists it would be up to the Government to show that the entity was not providing a public benefit. Removing the presumption would in essence reverse the onus of proof, which we would not support.

UnitingCare Australia believes that the presumption of public benefit, derived from an identified head of charity, recognises both in law and community standards that the purpose of that entity is for public benefit. The listing of charitable heads brings with it an assumption that the law is satisfied that the purpose of an entity established under the specified head is charitable. To argue otherwise would make the listing of a charitable head redundant. The logical extension of removing the presumption would be to have only one head of charity namely that the purpose is beneficial to the community, thus confining the current heads of charity to a status of mere guidance.

As outlined earlier in this submission UnitingCare Australia believes that the introduction of a statutory definition, like any other reform, must address weaknesses of the current arrangements and should not result in an unnecessary increase in administrative and/or regulatory burden. The removal of the Public Benefit Presumption fails both these tests. The discussion paper states that in other jurisdictions where the presumption of public benefit was removed there was little impact on the affected charities. While it is true that

many other jurisdictions have removed the presumption of public benefit it is worth noting that the Republic of Ireland have maintained the presumption for the advancement of religion. This raises an interesting question about whether it is necessary remove the presumption of public benefit following the introduction of a statutory definition of charity. There is no compelling argument put forward in the discussion paper to support removing the presumption on the introduction of a statutory definition of charity. Given the decision to establish a new and sector specific regulator with its registration, reporting and compliance functions and the inevitable increase in associated administrative processes on the charity sector, it is difficult to see what real improvements could be achieved in terms of transparency and accountability in removing the current presumption.

Indeed we would argue that, should the definition of charitable purpose be extended beyond the first three heads of charity to reflect a more contemporary understanding of charitable purpose, those named purposes should also be afforded a presumption of public benefit. That is, should the statutory definition of charity be extended to reflect those purposes outlined in the Part 3 of the Charities Bill 2003, then those purposes should be considered equivalent to the current common law heads and in turn attract a presumption of public benefit.

Finally, where an entity seeks charitable status under the general charitable head of “purpose that is beneficial to the community” then it would be appropriate for that entity to demonstrate that its purpose is of public benefit. It would be helpful for the ACNC to establish guidelines for entities seeking charitable status under this head of charity.

### **3.2 Public benefit test**

As indicated above at 3.1, we see merit in increasing the number of charitable purposes that receive a presumption of public benefit. We also recognise that there is a need to maintain a public benefit test however we believe this test would only be applied in certain circumstances. The first of these is when an entity seeks charitable status under a “purpose that is beneficial to the community”. As is currently the case entities seeking charitable status outside the established heads of charity must demonstrate that their purpose is of public benefit. We see no reason for that test to be removed in this circumstance.

While UnitingCare Australia has called for the extension of the presumption of public benefit, we also acknowledge that the Commonwealth’s regulatory function must enable it to adequately deal with entities that undertake actions or activities which may be contrary to and inconsistent with their charitable status or which fall with a set of disqualifying activities. In circumstances where a charitable entity is deregistered by the regulator and that charity seeks to be registered again as a charitable entity it is our view that the entity needs to demonstrate that its purpose is for public benefit. In other words that entity is no longer able rely on a presumption of public benefit.

### **3.3 Political Advocacy**

The High Court’s decision in *Aid/Watch* confirmed that the generation of public debate by lawful means, concerning matters arising under one of the established heads of charity, is itself an activity beneficial to the community. The implications of this decision are significant for the sector that has faced restrictions over the past decade on its capacity to advocate on

issues because of 'gag' clauses in Government funding agreements (which were removed by the Labor Government in 2007) as well the previous prevailing and narrow view that advocacy can only be incidental or ancillary to an entity's charitable purpose.

UnitingCare Australia believes that political advocacy is essential in addressing social justice issues and promoting solutions to long-term social problems. Advocacy which seeks to change the law or government policy or supports a particular cause related to the purpose of the entity is an essential element of the work of social service providers and their peak bodies.

While we have reservations about including disqualifying activities in a new Charities Bill, we acknowledge that there may be some community concerns about charities undertaking political advocacy. This issue will need careful consideration especially given the High Court's decision in *Aid/Watch*.

The suggestion in the Consultation paper (paragraph 108) to modify disqualifying political activities in the 2003 Charities Bill has merit. The discussion paper suggests that the disqualifying political activity in the Charities Bill 2003 be amended to reflect the current law. We note that the discussion paper suggests removing from the list of disqualifying activities paragraph c - activities of the type which are attempting to change the law or government policy. We agree that this should be removed. We would also argue that reference to advocating for a political cause (paragraph a) should also be removed.

We would also suggest that the remaining two disqualifying activities be amended replacing the term 'advocacy' with 'endorsing'. As such we propose that should there be a reference to disqualifying political activities in the new Bill, they should be restricted to:

- Endorsing the election of political party; and
- Endorsing the election of a candidate for political office.

Replacing the term 'advocacy' with 'endorsing' we believe provides more certainty around what a charity can and cannot do in terms of political advocacy.

It is our view that the *Aid/Watch* case established an important legal principle, which in essence confers a right on charities to participate in political advocacy and debate. The *Aid/Watch* case recognises that the generation of public debate in the context of a charitable head is itself an activity beneficial to the community. Accordingly we would be concerned with any attempt to weaken the principles outlined by the High Court in the *Aid/Watch* case in the development and implementation of the statutory definition of charity.

To safeguard the rights of charities to participate in political debate we believe that the disqualifying activity must be narrowly defined. Any reference to disqualifying political activity, whether part of a new Charities Bill or some other legislative instrument must be accompanied with an explanatory memorandum which includes a clear articulation of the rationale for the disqualifying activities as well as a statement recognising the rights of charitable entities to participate in political debate and advocacy, particularly during elections.

In terms of guidance on how the provision should be interpreted, we offer the following examples. Assessing and comparing the policies of political parties and candidates during the course of an election should be encouraged and **would not** be a disqualifying political activity. However developing material or publicly advocating the election of a particular party

or candidate would fall within the scope of the disqualifying activity. Further, a charitable entity which either supports or opposes a particular policy position of a party or candidate should be free to express their position. The expression of that position **would not** fall within the meaning of a disqualifying political activity.

The introduction of a disqualifying political activity brings with it an inherent risk that a future Government could use this provision to “gag” charitable entities from participating in political debate and advocacy. It is essential therefore that the appropriate safeguards are included in order to limit both the temptation and capacity of any future Governments to restrict charitable entities from participating in political debate and advocacy. These safeguards must accompany any legislative instruments which include a reference to disqualifying political activities. Even with this legislative safeguard in place we would see a role for the ACNC and Electoral Commission to work with relevant parts of the sector in fine tuning any guidance material developed on this issue. Without the appropriate legislative guarantees to limit the application of the disqualifying political activity provision UnitingCare Australia would not support the inclusion of this disqualifying activity.

### **3.4 Peak Bodies**

UnitingCare Australia supports the principles outlined in the New South Wales Administrative Decisions Tribunal<sup>1</sup> which held that a body which enhances the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution. This decision together with *Aid/Watch* reflects the role of a contemporary peak body and the activities they undertake in support of the charitable sector.

### **3.5 Charity infrastructure entities**

The discussion paper has highlighted a number of important issues relevant to the introduction of a statutory definition of charity. One issue which the discussion paper is silent on is the treatment of charity infrastructure entities that is those entities created for the sole purpose of supporting the mission of the charitable entity. These infrastructure entities take various forms and include financial entities, legal and other support services entities. These entities play an important role in supporting the work of the charitable entity.

UnitingCare Australia believes that, like peak bodies, these entities should be considered as bodies which enhance the long-term viability of charitable organisations through the provision of services that a contemporary charitable entity needs to function effectively. We recognise that this issue may require further consideration and consultation with the sector and recommend that this be undertaken prior to the development of the draft Bill.

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<sup>1</sup> *Social Ventures Australia Limited v. Chief Commissioner of State Revenue* [2008] NSWADT 331.

### **3.6 Other observations**

The discussion paper seeks a response to the question of whether the purpose(s) of an entity must be dominant or exclusively charitable. UnitingCare Australia believes the dominant purpose would be more appropriate as it provides sufficient clarity but with a degree of flexibility.

The discussion paper also raises the important question around disqualifying activities. While we have addressed the issue around political advocacy in section 3.3 of our submission, we recognise that there may be occasions where the actions or activities of an entity are contrary to and inconsistent with their charitable status which needs to be addressed by the regulator and in some cases the criminal and civil justice systems. Such issues have been raised in various inquiries particularly in relation to cults.

Addressing such issues is complex and difficult and while we recognise this, we need to guard against solutions which inadvertently capture lawfully operating entities or put in place onerous new burdens on all charitable entities.

In section 3.2 of this submission we raised the issue of removing the public benefit presumption in circumstances where an entity, that has been deregistered, seeks to be re-registered by the ACNC. Enabling a deregistered entity to reapply raises some important questions around what, if any, other factors the ACNC would need to take into account so as to ensure that the re-applying entity does not repeat the concerns which led to its initial deregistration. In dealing with the issue of re-registration it may be appropriate for some additional criteria to be applied which sit outside a Public Benefit Test but are nonetheless material in determining whether a deregistered entity should be re-registered. These criteria may include prescribed governance structures as well as an assessment of the suitability of the directors of that entity. In order to maintain public confidence in the sector we believe that a de-registered entity wishing to be re-registered as a charitable entity must meet a higher set of registration requirements. The development and application of re-registration criteria should assist this sector in maintaining the confidence of the general public.

## **4. Conclusion**

UnitingCare Australia supports the introduction of a statutory definition of charity. That said we have identified some key issues which we believe need to be addressed in the context of this new arrangement. We believe that the introduction of a statutory definition of charity should address the actual weaknesses of the current arrangements but not at the expenses of its strengths. Further the introduction of a statutory definition of Charity should not result in an increase in administrative or regulatory burden on the sector.

UnitingCare Australia believes strongly that a statutory definition of charity should retain the current Public Benefit presumptions and indeed expand them to any new head introduced as part of the introduction of a statutory definition of charity. We also believe that safeguards must be put in place to protect the rights of charities to participate in political debate, particularly during the course of an election. While we recognise that there may be some concerns in the community regarding charities undertaking political advocacy we believe that any restrictions on the political advocacy of charities must be narrowly defined. Without this



protection we would be reluctant to support the inclusion of disqualifying political activity provisions.

Finally, UnitingCare Australia believes that charity infrastructure entities should be considered as bodies which enhance the long-term viability of charitable organisations through the provision of services that contemporary charitable entities need to function effectively. As such they should be afforded the current and appropriate charitable status.