



SUBMISSION ON THE CONSULTATION PAPER ON THE DEFINITION OF CHARITY

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ABOUT VOICELESS

As an innovator, capacity builder and ideas-generator, Voiceless plays a leading role in the development of a cutting edge social justice movement, animal protection.

With a highly professional and well-educated team, Voiceless brings together like-minded compassionate Australians from the legal, academic, non-profit and education sectors to form strong and effective networks.

Voiceless believes in the provision of quality information, analysis and resources to inspire debate and discussion and to empower individuals and organisations to generate positive social change.

Voiceless is a non-profit Australian organisation established in May 2004 by father and daughter team Brian and Ondine Sherman.

To build and fortify the animal protection movement, Voiceless:

- Creates and fosters networks of leading lawyers, politicians, businesspeople and academics to influence law, policy, business and public opinion;
- Conducts high quality research and analysis of animal industries, exposing legalised cruelty and promoting informed debate;
- Creates a groundswell for social change by building and fortifying the Australian animal protection movement with select grants and prizes;
- Grows animal law as a mainstream practice area to advocate for change in the courts and in legislation; and
- Informs consumers and empowers them to make animal-friendly choices.

PATRONS

J.M. COETZEE, Nobel Prize for Literature Winner 2003, author of 'Lives of Animals' and 'Elizabeth Costello'

BRIAN SHERMAN AM, businessman and philanthropist

DR JANE GOODALL, world-renowned primatologist and animal advocate

THE HON MICHAEL KIRBY AC CMG, former justice of the High Court of Australia

AMBASSADORS

HUGO WEAVING, Actor

Last Ride, Little Fish, Lord of the Rings Trilogy, Matrix Trilogy, The Adventures of Priscilla Queen of the Desert, Oranges and Sunshine

EMILY BARCLAY, Actor

Prime Mover, Piece of my Heart, Suburban Mayhem, In My Father's Den

ABBIE CORNISH, Actor

Bright Star, Stop Loss, Elizabeth: The Golden Age, Somersault, Candy, A Good Year, Suckerpunch, Limitless

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1 Introduction

- 1.1 The Government has released a Consultation Paper on the definition of charity as part of a consultation process to provide interested parties with an opportunity to comment. Voiceless takes this opportunity to comment on the 'consultation questions' posed throughout the paper (in the order that they appear) as they relate to Voiceless and on any other matters deemed relevant.

2 Question 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?

- 2.1 Voiceless considers that the word 'exclusively' sets too high a standard and recommends that a more appropriate requirement would be that used in England – that a charity must be 'established for charitable purposes only', or in Ireland – that a charity is one 'that promotes a charitable purpose only'. It is important that the definition be clear on stating that for an entity to be charitable, the entity can also have other purposes that further or are in aid of, or are ancillary or incidental to the charitable purpose.¹
- 2.2 The only other concern with amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose would be if 'the prevention and relief of suffering of animals' was no longer deemed a charitable purpose. While the 2003 definition does not include 'the prevention and relief of suffering of animals' as a distinct charitable purpose, it is cited as an example of a purpose which falls under 'other purposes beneficial to the community'.² The inclusion of 'the prevention and relief of suffering of animals' as a charitable purpose is discussed in greater detail below.

3 Question 5: Could the term 'for the public benefit' be further clarified, for example, by including additional principles outlined in ruling TR2011/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?

- 3.1 The term 'for the public benefit' could benefit from being further clarified by including additional principles as outlined in ruling TR 2011/D2 and the guidance material of the Charities Commission of England and Wales. Of specific utility would be examples of purposes considered beneficial to the

¹ Paragraph 51 of the Consultation Paper.

² See paragraph 1.84 of the Exposure Draft of the Charities Bill 2003 Explanatory Material (footnote 2 of the Consultation Paper).

community, such as moral benefits derived from prevention of cruelty to animals³ or the prevention or relief of suffering of animals⁴.

- 3.2 The Consultation Paper (paragraph 60) refers to the 2010 Senate Inquiry, which proposed that a public benefit test include various principles, including that 'the benefit must be balanced against any detriment or harm'. It is important, should such a principle be incorporated into a public benefit test, that examples be given of matters that might be considered detrimental or harmful. The guidance material of the Charity Commission of England and Wales should be looked to, which provides as examples of detriment or harm: 'something that is damaging to the environment or mental or physical health or encourages hatred towards others'. If the matter is left open for interpretation, charities may suffer should the interpretation be an unreasonable one. To give an example, a charity may have as one of its purposes the unveiling of industry conditions in order to highlight the manner in which animals are treated cruelly, with a view to ending such practices and therefore ending animal cruelty in that respect. The industry concerned might consider the scrutiny to be detrimental upon it, especially if such scrutiny could cause harm to profit margins. There is likelihood for other similar scenarios where a profitable industry, sector, group or institution could suffer due to scrutiny of its practices.

4 Question 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?

- 4.1 Generally speaking, Voiceless prefers the approach taken by England and Wales as to the meaning of public benefit as it provides greater flexibility. However, to a certain extent, it is preferable for one piece of legislation to deal with all relevant matters, preventing, as far as possible, the need to look elsewhere (in addition to case law) for guidance. A certain degree of flexibility can exist in legislation where principles are enunciated with adequate definitions, such as the definition of detriment or harm as discussed above and the definition of public benefit in Northern Ireland's *Charities Act (Northern Ireland) 2008*.⁵
- 4.2 Overall, it is Voiceless's position that 'public benefit' should be defined in the statutory definition with further guidance on the meaning of the term to be provided by the ACNC.

³ ATO Draft Taxation Ruling TR 2011/D2 paragraph 118.

⁴ Charities Act 2009 (Ireland), Section 11(j), page 33 of the Consultation Paper.

⁵ Pages 36 - 37 of the Consultation Paper.

5 Question 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?

- 5.1 Requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit might prove burdensome depending on the circumstances. If an existing charity has been deemed to be for the public benefit, it is surely not necessary for that charity to continue demonstrating they are for the public benefit, unless their purposes have changed. An entity seeking approval as a charity should be able to demonstrate that it is for the public benefit. In both scenarios, there may be administrative hurdles, however, these hurdles can be diminished if the definition of charity provides clarity on what public benefit is (see comments on question 6 above).

6 Question 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?

- 6.1 The ACNC should provide advisory assistance where the definition of charity does not provide clarity as to the public benefit test. This should be provided by way of guidance material and verbal advice where any guidance material is lacking and where a charity has failed to demonstrate meeting the test.

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

- 7.1 Voiceless sees no issue with a requirement that activities of a charity be in furtherance or in aid of its charitable purpose. At a minimum, a charity should be carrying out activities that are in furtherance or in aid of its charitable purpose.

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

- 8.1 Voiceless doesn't think it's necessary to clarify the role of activities in determining an entity's status as a charity any further than specifying that a charity must carry out activities in furtherance or in aid of its charitable purpose. A charity's activities should be self-evident.

9 Question 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?

- 9.1 Voiceless agrees that activities of the type which is attempting to change the law or government policy (section 8(2)(c)) should be removed from disqualifying activities. This would enable charities to engage in political activities, so long as those activities are in furtherance and in aid of its charitable purpose.
- 9.2 The Consultation Paper (question 12, page 18) raises the issue of whether the definition should clarify the meaning of political activity. While there is benefit in defining a term in legislation, specifically that it enables clarity on the term, it is generally not possible in legislation to sufficiently explain the meaning of a term. In most circumstances, there will be a need to seek guidance on the meaning of a term, either by considering case law, explanatory material or other guidelines. Providing further guidance on the term as has been done by the Charity Commission of England and Wales could prove quite useful. Voiceless agrees with the Charity Commission's guidance on campaigning and political activities and believes it would be beneficial if Australia emulated that guidance.

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

- 10.1 Section 8(2)(a) of the *Charities Bill 2003* states that a disqualifying purpose is the purpose of advocating a political party or cause. The Consultation Paper (paragraph 114) questions whether there are any issues with prohibiting charities from advocating a political party. It also raises the possibility of whether a reference to 'cause' is necessary.
- 10.2 Voiceless agrees that problems could arise where a charity advocates a political party, especially where a charity's independence could be compromised and public confidence in the charity could be eroded. However, Voiceless believes it is important for charities to be able to advocate a political cause if it is a cause in furtherance of a charity's charitable purposes. Voiceless therefore recommends that the reference to 'cause' should be removed from section 8(2)(a) of the *Charities Bill 2003* thereby removing the advocacy of a political cause from being a disqualifying purpose.
- 10.3 The Consultation Paper also raises an issue concerning section 8(2)(b) and whether in addition to supporting a candidate for political office, it should also refer to opposing a candidate for political office. Voiceless doesn't believe that it's of utmost importance that reference should also be made to opposing a

candidate for political office. It may affect the public's perception of the charity should it oppose a candidate but not to the extent that the public's perception of a charity might be affected due to a charity supporting a candidate.

- 10.4 There needs to be a clear distinction between advocating, supporting or opposing a cause and advocating, supporting or opposing a candidate for a political party. As illustrated in paragraph 9 above, a charity should be allowed to advocate, support or oppose a political cause provided it relates directly to the advancement of the charitable purposes of the charity. This is the situation in Scotland, England, Wales, Ireland and New Zealand⁶ and it should be emulated here. There should be restrictions though when the advocacy or support is that of a political candidate. Again, England and Wales should be looked to for guidance on this point.
- 10.5 Further, there needs to be clarity surrounding the political discourse that charities can engage in. Charities should be able to engage in political discourse where the discourse is in furtherance of a charity's charitable purposes. The statutory definition (or at least guidance material) should clarify that such activities are not disqualifying activities.

11 Question 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?

11.1 The list of charitable purposes in the *Charities Bill 2003* includes:

- (a) the advancement of health;
- (b) the advancement of education;
- (c) the advancement of social or community welfare;
- (d) the advancement of religion;
- (e) the advancement of culture;
- (f) the advancement of the natural environment; and
- (g) any other purpose that is beneficial to the community.

11.2 The explanatory material to the *Charities Bill 2003* provides examples of the kind of entities that would be recognised as charitable under the listed charitable heads. The types of entities that would be considered charitable under the head 'any other purpose that is beneficial to the community' include:

⁶ Page 41 – 43 of the Consultation Paper.

- (a) the promotion and protection of civil and human rights;
- (b) the promotion of reconciliation, mutual respect and tolerance between various groups within Australia;
- (c) the protection and safety of the general public; and
- (d) the prevention and relief of suffering of animals.

- 11.3 Voiceless recommends that the types of entities listed in paragraph 11.2 above, especially 'the prevention and relief of suffering of animals', should be included in the list of charitable purposes in the definition. These are purposes that have been considered beneficial to the community and they should be included as individual heads rather than falling under 'any other purpose'. This will increase clarity and acknowledge these heads as significant heads of charity. The 'any other purpose' head could cater for any other heads not yet established by existing law and/or policy.
- 11.4 Various factors support the inclusion of 'the prevention and relief of suffering of animals' as a distinct charitable purpose. One such factor is the number of overseas jurisdictions that have incorporated such a purpose in their lists of charitable purposes. For example:
- (a) England and Wales include 'the advancement of animal welfare' in their list of charitable purposes;⁷
 - (b) Scotland includes 'the advancement of animal welfare' in its list of charitable purposes;⁸
 - (c) Ireland includes 'the prevention or relief of suffering of animals' in its list of charitable purposes;⁹ and
 - (d) Northern Ireland includes 'the advancement of animal welfare' in its list of charitable purposes.¹⁰
- 11.5 Another factor is case law where it has been recognised that the protection of animals represents a charitable purpose.¹¹ This is so because of the benefit to the community through promoting 'human feelings' and improving 'public morality'.¹²

⁷ Section 2(k) *Charities Act 2006*

⁸ Section 2(0) *Charities and Trustee Investment (Scotland) Act 2005*

⁹ Section 11(j) *Charities Act 2009*

¹⁰ Section 2(k) *Charities Act (Northern Ireland) 2008*

¹¹ LexisNexis, *Australian Encyclopaedia of Forms & Precedents*, (at February 2011) 2590 Protection of fauna and flora, 'Charities' [2590].

¹² *Re Weaver* [1963] VR 257

- 11.6 In the case of *Re Wedgwood*¹³, which concerned a gift directed towards humane slaughtering of animals, it was held that a gift for the protection and benefit of animals is a gift for a general public purpose beneficial to the community and therefore a good charitable gift. The reasons for reaching this conclusion were that:

'A gift for the benefit and protection of animals tends to promote and encourage kindness towards them, to discourage cruelty, and to ameliorate the condition of brute creation, and thus to stimulate humane and generous sentiments in man towards the lower animals, and by these means promote feelings of humanity and morality generally, repress brutality, and thus elevate the human race.'

- 11.7 A number of cases have also held that gifts to animal welfare organisations for the care of, and suppression of cruelty against, animals are charitable¹⁴ as are gifts to establish homes for stray, sick or unwanted animals¹⁵.
- 11.8 Voiceless would also agree with a charitable purpose of 'the advancement of animal welfare'. Such a charitable purpose framed this way is wider than 'the prevention or relief of suffering of animals' and would therefore capture more than just animals who 'suffer'.

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

- 12.1 Voiceless considers it necessary that there be a harmonised definition of charity. Charitable purposes should be treated consistently throughout the Commonwealth, the States and the Territories. Voiceless agrees with the proposal that an entity be described as a registered charity where subsets of charities are referred to.

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

- 13.1 The Consultation Paper (paragraph 154) raises the issue of whether existing charities that have been endorsed by the ATO prior to the commencement date will retain their charitable status from the commencement date. The Paper proposes that existing charities will not need to reapply for registration by the

¹³ [1915] 1 Ch 113 at 122 per Swinfen Eady LJ.

¹⁴ *Re Pitt Cobett* (1923) 19 Tas IR 43, *Re Buckley* [1928] NZLR 148, *Re Weaver* [1963] VR 257 at 265 per Hudson J, *Re Inman* [1965] VR 238 at 242 per Gowans J, *Re Goodson (deceased)* [1971] VR 801 at 809-10 per Adam J, *Public Trustee v Clayton* (1985) 38 SASR 1.

¹⁵ *Adamson v Melbourne and Metropolitan Board of Works* [1895] AC 142 at 148, *Swift v Attorney-General (Ireland) (No 2)* [1912] 1 IR 133, *Re Hodge* [1960] SASR 237, *Re Satterthwaite's Will Trusts* [1966] 1 All Er 919 at 924 per Russell LJ, *Attorney General v Bray* (1964) 111 CLR 402.

ACNC but continue to self-assess eligibility against the statutory definition from the commencement date. Voiceless agrees with this proposal and recommends that it be accepted.

14 Other matters

- 14.1 A statutory definition of charity is a crucial step in reforming the not-for-profit sector. There is another aspect though that is equally as important – the tax concessions available to the sector.
- 14.2 In the 2010 Productivity Commission Research Report *Contribution of the Not-for-Profit Sector*, the same report that recommended a statutory definition of charity, the Report made a number of findings about the tax concessions available to the sector. These related specifically to the distribution and accessibility of the concessions and the level of distortion that the concessions create. Specifically, the Report found that:
- (a) current DGR arrangements are distortionary and out of date;
 - (b) while DGR status covers a range of Not-for-Profits, the scope of eligible activities is narrow in Australia relative to that in comparable overseas countries;
 - (c) the current DGR system distorts philanthropic giving towards organisations with DGR status by reducing the cost of giving to DGR charities relative to non-DGR charities;
 - (d) widening the scope of DGR eligibility to include all charities would remove the current bias towards charities with DGR status and increase the choice of DGRs for donors;
 - (e) the Commission believes that gift deductibility should be widened to include all tax endorsed charities in the interests of equity and simplicity.¹⁶
- 14.3 The 2010 *Review into Australia's Future Tax System* formed similar conclusions.
- 14.4 Voiceless takes this opportunity to emphasise the need for a reassessment of the tax concessions available to the not-for-profit sector, specifically the widening of eligibility for DGR status to include all tax endorsed charities.

¹⁶ Australian Government Productivity Commission, *Contribution of the Not-for-Profit Sector* (Productivity Commission Research Report 2010) LVII, 177 – 179.

15 Summary

15.1 In summary, Voiceless makes the following comments / recommendations:

- (a) Requiring that a charity have an 'exclusively' charitable purpose sets too high a standard. A more appropriate requirement would be that a charity must be 'established for charitable purposes only' or be one 'that promotes a charitable purpose only'. Amending the 2003 definition to replace the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose otherwise would only concern Voiceless if 'the prevention and relief of suffering of animals' was no longer deemed a charitable purpose.
- (b) The term 'for the public benefit' could benefit from being further clarified by including additional principles as outlined in ruling TR 2011/D2 and the guidance material of the Charities Commission of England and Wales. Of specific utility would be examples of purposes considered beneficial to the community, such as moral benefits derived from prevention of cruelty to animals or the prevention or relief of suffering of animals.
- (c) The term 'public benefit' should be defined in the statutory definition with further guidance on the meaning of the term to be provided by the ACNC.
- (d) Requiring an existing charity or an entity seeking approval as a charity to demonstrate they are for the public benefit might prove burdensome depending on the circumstances. Ensuring public benefit is clarified may however diminish any such burdens.
- (e) The ACNC should provide advisory assistance where the definition of charity does not provide clarity as to the public benefit test.
- (f) Voiceless sees no issue with a requirement that activities of a charity be in furtherance or in aid of its charitable purpose.
- (g) It's not necessary to clarify the role of activities in determining an entity's status as a charity any further than specifying that a charity must carry out activities in furtherance or in aid of its charitable purpose.
- (h) Activities of the type which is attempting to change the law or government policy should be removed from disqualifying activities thus enabling charities to engage in political activities in furtherance and in aid of its charitable purpose. Australia should emulate the guidance provided by the Charity Commission of England and Wales on campaigning and political activities.

- (i) The reference to 'cause' should be removed from section 8(2)(a) of the *Charities Bill 2003* thereby removing the advocacy of a political cause from being a disqualifying purpose. A charity should be allowed to advocate, support or oppose a political cause provided it relates directly to the advancement of the charitable purposes of the charity. There should be restrictions though when the advocacy or support is that of a political candidate.
- (j) It is not necessary to refer to opposing a candidate for political office in section 8(2)(b) of the *Charities Bill 2003*.
- (k) There needs to be clarity surrounding the political discourse charities can engage in and the statutory definition (or at least guidance material) should clarify that such activities are not disqualifying activities.
- (l) The types of entities listed in paragraph 11.2 above, which fall within the purpose of 'any other purpose that is beneficial to the community', especially 'the prevention and relief of suffering of animals', should be included in the list of charitable purposes in the definition.
- (m) Voiceless agrees with the proposal that existing charities will not need to reapply for registration by the ACNC but continue to self-assess eligibility against the statutory definition from the commencement date, and recommends that it be accepted.
- (n) There needs to be a reassessment of the tax concessions available to the not-for-profit sector, specifically the widening of eligibility for DGR status to include all tax endorsed charities.

Respectfully submitted by Ruth Hatten, Legal Counsel, Voiceless