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strong **FAMILIES** strong **COMMUNITIES**

YMCA Australia

YMCA AUSTRALIA

Response to

Consultation Paper: A Definition of Charity

DEC 2011

INTRODUCTION

YMCA Australia welcomes the opportunity to present our views in response to the *Consultation Paper: A Definition of Charity*.

As potentially one of the most significant elements of current reform, the proposed introduction of a statutory definition of charity will provide consistency and clarity for the not-for-profit sector, governments and the general public.

This conversation is not new and the YMCA has been engaged in policy debate with regard to not-for-profit sector reform for many years. We have previously put forward our views through our:

- submission to the *2001 Inquiry into the Definition of Charities and Related Organisations*;
- response to the Exposure Draft of the *Charities Bill, 2003*
- submission to the *2008 Inquiry into Disclosure Regimes for Charities and Not-for-Profit Organisations*;
- submission in 2008 on the *Development of a National Compact* and our response to the *2009 National Compact Consultation Paper*;
- response to the *2009 Productivity Commission Inquiry into the Contribution of the Not-for-Profit Sector*;
- response to the *2011 Scoping Study for a National Not-for-Profit Regulator*; and our
- submission to the *2011 Inquiry into Mechanisms and Options for the Development of a Capital Market for Social Economy Organisations*.

The YMCA has also participated in numerous not-for-profit sector forums and consultations regarding issues of sector reform.

As an active member of both the Community Council of Australia (CCA) and the Australian Council of Social Service (ACOSS), we would also like to express our support and endorsement of CCA and ACOSS submissions to this consultation.

THE YMCA IN AUSTRALIA

YMCA Australia is a national not-for-profit organisation working alongside local communities in metropolitan, regional, rural and remote areas. We work in partnership with government, non-profit groups and partners to provide programs and services to more than 500,000 Australians every week and deliver a broad and diverse range of services and programs.

Our mission is to work together to provide opportunities for all people to grow in body, mind and spirit. We believe this can best be achieved within a framework of preventative health, social inclusion and community-based localised solutions.

The profile of the YMCA in Australia is one of diversity – in terms of our programs and services, the communities we serve and our geographic reach. YMCA Australia also has a diversity of relationships with all levels of government and has a broad variety of revenue streams that support our programs.

In Australia, the YMCA:

- is a federated organisation comprising 30 independent Associations;
- employs over 13,000 staff;
- is supported by over 3,000 volunteers;
- works across more than 600 sites in every state and territory;
- derives 2% of revenue through contributions from the philanthropic sector and public donations;
- derives 4% of revenue from government sources; and
- derives the remaining 94% from the provision of programs and services that are operated on a cost-recovery basis.

YMCA Australia operates across all state and territory jurisdictions and we deliver on our mission in myriad ways. Our organisation, our partners and the communities we serve, have a significant interest in these developments towards not-for-profit sector reform.

The scope and diversity of the YMCA in Australia presents a unique set of challenges in relation to the current regulatory and legislative environment. When considering the issues posed by the existing regulatory framework, the YMCA in Australia is challenged by a number of characteristics, including:

- the variety of legal forms that constitute our organisation. The YMCA in Australia is a federated organisation with YMCA Australia as a Company Limited by Guarantee and our 30 Member Associations as a mix of Incorporated Associations (across each state and territory), Companies Limited by Guarantee, and Associations developed as a result of state legislation. A number of our Member Associations also have within their structure a variety of sub-entities, some of which are Companies Limited by

Guarantee, other Incorporated Associations and unincorporated bodies. All YMCA Member Associations have charitable status, and some have separate benevolent arms;

- that as a national organisation, the YMCA in Australia is subject to Commonwealth legislation and regulation in addition to the variety of existing state and territory regulatory frameworks; and
- in terms of our activities as an organisation, the YMCA is engaged across a broad range within the NFP sector including: accommodation; early childhood education and care; out of school hours care; youth services; disability services and health and wellness services. All of these areas are subject to extensive regulatory frameworks and these too vary across jurisdictions.

Given the diversity of our organisation and the national, state and local contexts in which we deliver services to the community, it will be critical that a statutory definition of charity remains flexible while creating clarity and consistency.

In the following submission we have provided responses to the consultation questions that are of most relevance to the YMCA and our member Associations.

ISSUES IN DEFINING A CHARITY

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?*

In order to achieve the necessary flexibility in the definition and more broadly, to reflect the contemporary nature of social economy organisations it will be important to retain the 'dominant purpose' requirement contained in the 2003 definition. Requiring that a charity have an 'exclusively' charitable purpose will narrow the definition and does not adequately reflect the diversity of the sector and the current context in which not-for-profit organisations operate.

It will be critical for there to be clarity in how a dominant charitable purpose will be tested and that an 'activities' test will not form part of the determination of charitable status. While the YMCA agrees that some activities carried out by an entity may not in themselves be intrinsically charitable, provided these activities are in support of the dominant charitable purpose, these activities should not be the primary determinant of charitable status. This appropriately reflects the current context in which the sector operates in that many organisations seek to diversify their revenue stream through fees for services, social enterprise and the reinvestment of surplus revenue in support of charitable purposes. Acknowledging this in the definition will support the growth of a more independent, self-reliant and innovative sector.

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

The YMCA agrees that there needs to be greater clarification of the terms 'sufficient section of the general community' and 'numerically negligible' to ensure that entities providing support and benefit to small sections of the community are not excluded in the definition of charity.

The YMCA recommends that 'public benefit':

- Is aimed at achieving a universal or common good;
- Has a practical utility. Practical utility relates to either/or the physical, mental and spiritual needs of the beneficiaries;
- Is directed to the benefit of the general community. The general community is defined as those people who are who are able to make use of the benefit being offered.

5. *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?*

Clarification of the term 'for the public benefit' should only occur if it supports greater flexibility in terms of the mission and purpose of an entity. The YMCA believes that 'prevention' must be included in any expansion of the term 'for the public benefit'. In support of our mission, the YMCA conducts activities (provides programs and services) that promote individual and community wellbeing, prevent and alleviate the impacts of health and lifestyle diseases such as obesity and address issues such as social exclusion and social isolation. These activities address contemporary social and public policy issues, are for the common good and have practical utility and as such, should be included in the definition of 'for the public benefit'. This inclusion would also reflect recommendations made by the 2001 Charities Definition Inquiry.

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?*

For an existing charitable entity, the primary issue will be costs associated with the review of charitable status. Potentially negative impacts on programs and services may arise if those programs and services are required to be suspended while the entity is undergoing a review.

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?*

It will be critical for the role of the ACNC to be clearly distinguishable and independent from the ATO, not only in the determination of charitable status, but also in the determination of whether a charitable entity is entitled to associated tax concessions. This is not clearly articulated in the Consultation Paper. A long-held concern of the sector has been the inherent conflict of interest in the role of the ATO as both revenue collector and regulator. The establishment of the ACNC is pivotal in removing this conflict, but this will only be fully realised if the ACNC is provided with greater powers in determining eligibility for tax concessions.

With regard to demonstrating 'public benefit', the ACNC should be provided with the power to make this determination based on a clearly articulated set of criteria. The ACNC should also have the role of proactively supporting charities and as such, provide charitable organisations with tools and resources to assist them in demonstrating and reporting on their public benefit. To ensure that charities continue to meet the 'public benefit' test, the ACNC could utilise historical information in addition to regular reporting by charities to make this continued determination. This would place the ongoing onus of proof with the ACNC, rather than charitable organisations.

Newly established charitable organisations may be required to provide more detailed information and undergo greater monitoring and compliance in order to initially establish that they meet the 'public benefit' test. There will also be a clear role of support and guidance at this point for the ACNC.

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

This would present a serious issue for many organisations, including the YMCA in Australia. The presumption of benefit is an important element in limiting regulatory burden and compliance and overturning this presumption would not only have a deleterious impact on the efficacy of organisations such as the YMCA, but would create undue burden on the sector in terms of demonstrating compliance. The Federal Government has committed to the reduction of the regulatory burden on the sector and overturning the presumption of benefit would not enhance the functioning of the current regulatory framework.

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

YMCA Australia agrees that the activities of an organisation should be in furtherance or in aid of its charitable purpose, provided that there is flexibility to promote independence and innovation in the sector. The sector is clearly seeing now a strong shift towards social enterprise and entrepreneurialism as many organisations are seeking innovating ways of diversifying their revenue streams. This, in turn, creates a more robust and self-reliant sector with organisations seeking out more progressive and sustainable ways of meeting their mission and purpose.

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

As stated in our response to Q.1, YMCA Australia believes that an organisation's activities should not be the primary determinant of charitable status. Any clarification of the role of activities in determining charitable status must preserve sufficient flexibility for charitable organisations to carry out activities that are in support of their dominant purpose, even if these activities are not in themselves charitable.

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?*

The majority of charitable organisations greatly value their position as apolitical actors in social and public policy debates. Equally, the mission and purpose of many charitable organisations, including the YMCA, compel organisations to advocate on behalf of the individuals and communities they serve. In many instances, this will be a deeply political activity that may seek to change government policy. The changes suggested in the Consultation Paper appropriately reflect this and are in keeping with the current context and environment in which charitable organisations operate.

CHARITABLE PURPOSES

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?*

The YMCA agrees that the list of charitable purposes is appropriate and should remain unchanged. Of particular relevance to the YMCA is that the meaning and definition of 'beneficial to the community' remains broad. The Consultation Paper raises issues regarding the current

inclusion of the term 'prevention' which we believe needs to be articulated clearly to more accurately reflect current public and social policy.

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

We would like to reiterate our position that sport and recreation be included in the list of charitable purposes given the clear role that sport and recreation plays in the health and wellbeing of individuals and communities and in promoting social inclusion.

OTHER ISSUES

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

YMCA Australia believes it will be important for the introduction of a statutory definition of charity to be accompanied by an appropriate level of education and resourcing for the sector in order to undertake any transitional requirements. Considering the breadth and diversity of the sector and the range of complementary reform processes currently underway, the introduction of a statutory definition will need to be a phased process that takes this diversity and the broader reform context into account.

CONCLUSION

YMCA Australia has been an active participant and interested observer with regard to the current process of reforms affecting the third sector in Australia and we welcome this consultation as a significant step forward.

The statutory definition of charity must be modern and flexible while being robust and clearly articulated. It must provide certainty for the sector, governments and the general public alike. The administration of the statutory definition by the ACNC must be independent and the role of the regulator must also be well defined and clearly articulated.

The YMCA looks forward to continued consultation in this process and is willing to discuss any aspect of this submission in further detail, if requested.