



YWCA Australia
***A Definition of Charity* Consultation Response**
December 2011

Response to the *A Definition of Charity* consultation paper

Thank you for the opportunity to comment on the *A Definition of Charity* consultation paper (**Consultation Paper**).

About YWCA Australia

YWCA Australia is the national association of YWCAs in Australia and is part of the World YWCA movement. We are a women-led organisation that achieves positive change by providing advocacy, programs and services for women, families and communities.

YWCAs undertake advocacy and deliver services and programs that develop the leadership and collective power of women and girls, support individuals, their families and communities at critical times, and promote gender equality and community strengthening.

YWCAs have been providing community services in Australia since the 1880s.

General principles

YWCA Australia strongly supports the introduction of a well-crafted, statutory definition of charity that will ultimately apply across all levels of government. In our view, this reform has the potential to reduce regulatory burden on the sector, and increase consistency, certainty transparency and ultimately effectiveness. However, it's important that the introduction of a statutory definition does not unintentionally result in a reduction of current and independent funding for charitable not for profit organisations (NFPs), an increase in compliance costs or unnecessary complexity in understanding the legal obligations of NFPs.

YWCA Australia supports a definition of charity that:

- Specifically incorporates the principle in the High Court's *Word Investments* decision that if an entity's main/predominant/dominant¹ purpose is charitable and it carries on a business or commercial enterprise to give effect to that charitable purpose, the entity may still have a charitable purpose. In line with the *Word Investments* decision, it should not be necessary for the activities themselves to be intrinsically charitable.
- Makes clear that advocating on behalf of those the charity seeks to assist, or lobbying for changes in laws, policies and government decisions that have direct effects on a charity's main/predominant/dominant purpose, are in the definition. Changes to the definition of charity should ensure that NFPs can provide both service delivery and advocacy to affect both individual and structural change without risking their status as a charity.

¹ For more information see Consultation Paper question 1 below.

- Supports membership participation where appropriate to the organisation.
- Specifically includes the provision of community- based childcare by NFP entities.
- Specifically includes the provision of rental dwellings under the National Rental Affordability Scheme (or similar future schemes) by NFP entities.
- Specifically includes the promotion of gender equality and diversity as a charitable purpose.

Consistency with NFP tax concessions reforms

YWCA Australia is concerned about inconsistency between the proposed definition of charity reforms and the proposed NFP tax concession reforms (which introduce the new language of 'altruistic purposes'). We urge the Australian Government to ensure that both sets of reforms are considered in a holistic way to ensure they are consistent and work together. Inconsistent regimes would create confusion and uncertainty for NFPs, undermining the aims of the Government's NFP reform agenda.

We repeat our call made in our submission on the *Better targeting of not-for-profit tax concessions* Consultation Paper² that any changes to the legal and regulatory framework should ensure that NFPs are able to maintain commercial social enterprises as independent, non-tied sources of surplus income as part of a mixed funding model. We note that by developing independent funding streams, the reliance of NFPs on government and philanthropic funding is reduced and the long term sustainability of charitable community programs and services is enhanced.

Consultation paper questions

Please note that we have not responded to all of the questions in the Consultation Paper.

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?

YWCA Australia does not support replacing the 'dominant purpose' requirement with the requirement that a charity have an exclusively charitable purpose. Requiring a charity to have an exclusively charitable purpose does not accurately reflect the current common law position which allows a charity to have a non-charitable purpose which is incidental or ancillary. We would support the definition of charity referring to 'main or predominant or dominant' purpose. In our view, the definition of charity should incorporate the position in ATO Taxation Ruling TR 2011/4³ which states:

Charitable purpose

26. An institution is charitable if

² Available at <http://ywca.org.au/advocacy/our-policy-work>

³ ATO Taxation Ruling TR 2011/4, paragraphs 26 to 29, <http://law.ato.gov.au/atolaw/view.htm?locid=%27TXR/TR20114/NAT/ATO/fp22%27&PiT=99991231235958#p22>

- *its only, or its 'main or predominant or dominant' purpose is charitable in the technical legal meaning and*
- *it was established and is maintained for that charitable purpose.*

In this Ruling, we typically refer to the required purpose as the 'sole purpose' of the institution because a charitable institution cannot have an independent non-charitable purpose (regardless of how minor that independent non-charitable purpose may be).

'Main or predominant or dominant' purpose

27. A purpose is the 'main or predominant or dominant' purpose of an institution if any other purpose the institution has is no more than incidental or ancillary to that purpose.

'Incidental or ancillary' purpose

28. A purpose is incidental or ancillary to a charitable purpose if it tends to assist, or naturally goes with, the achievement of the charitable purpose. It does not mean a purpose that is minor in quantitative terms.

Independent purpose

29. A purpose is independent rather than incidental or ancillary if it is an end in itself, or of substance in its own right or is not intended to further a charitable purpose.

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 New South Wales Administrative Tribunal decision appears to provide sufficient clarity about the circumstances when a peak body can be a charity. YWCA Australia supports the principle in the Administrative Tribunal decision that it is the degree of integration and commonality of purpose with its members that determines the charitable status of a peak body. Incorporating the Administrative Tribunal decision in the statutory definition of charity so that it couldn't be overturned would enhance certainty for peak bodies.

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

Australia is a large and diverse country and the community sector needs to be able to respond effectively to a wide range of needs in urban, rural, regional and remote communities. In our view, it is important that small groups of people, such as people living in rural and remote communities and people with rare medical conditions, may have charities catering to their specific needs. Anything less would be discriminatory treatment. YWCA Australia supports the Board of Taxation's recommendations in its review of the Charities Bill 2003 that 'sufficient section of the general community' be defined as one which is **not 'numerically negligible' compared with the size of that part of the community to whom the purpose would be relevant.**

'Example 2 - Purposes beneficial to the community' in TR 2011/D2⁴ illustrates well how a charity that targets a small group in the community can nevertheless be 'for the public benefit'. The example is also extremely relevant to the work of YWCA Australia, which seeks to promote gender equality. Example 2 states:

Women Engineers is a not for profit organisation with objects that provide for the development, advancement and promotion of females in various fields of engineering. The organisation also seeks to address the disadvantages experienced by females in engineering. Whilst membership of the organisation is limited to tertiary qualified female engineers, the purpose of advancing females in engineering is a purpose that is beneficial to the community as it is aligned to current social norms aimed at eliminating gender discrimination (as evidenced by anti-discrimination legislation) and is charitable in its technical legal sense .

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?

YWCA Australia supports appropriate modifications being made to enable native title holders to receive benefits from charities.

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?

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?

YWCA Australia recognises that ideas about what is for the public benefit can change over time. YWCA Australia supports a definition of charity that is flexible and able to respond to changing economic and social contexts. We support the statement expressed in TR 2011/D2 that:

The notion of what is beneficial to the public is not limited to a closed or historical list. As needs are satisfied, new needs arise or community views change, what constitutes a purpose that is beneficial to the community can change as well".⁵

However, flexibility needs to be balanced with clarity and certainty for the sector. We consider that the definition or explanatory material could provide guidance along the lines of that provided in ruling TR 2011/D2, which is more appropriate than the huge volume of guidance material provided by the Charities Commission of England and Wales.

⁴ Draft Taxation Ruling TR 2011/D2, Income tax and fringe benefits tax: charities, paragraph 74, available at <http://law.ato.gov.au/atolaw/view.htm?docid=%22DTR%2FTR2011D2%2FNAT%2FATO%2F00001%22>

⁵ Draft Taxation Ruling TR 2011/D2, paragraph 18.

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?

Requiring an existing charity to demonstrate they are for the public benefit would impose a considerable compliance burden and costs with little gain, particularly where the charity has been providing community services for the public benefit for a long time. Compliance costs would be exacerbated where the public benefits provided are difficult to quantify. Nevertheless, it would be appropriate for new entities seeking approval as a charity to demonstrate they are for the public benefit.

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

Again, we are concerned about the implications for charitable organisations that accumulate surplus funds that will ultimately be applied to the organisation's charitable purposes. The accounting measure of 'profits' can be misleading and the definition of charity should ensure that surplus funds/profits can be directed back to a charity's business or commercial enterprises to maintain the assets without jeopardising the charitable status of the organisation.

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

In our view, the definition of charity should focus primarily on the **purposes** of an organisation when defining whether an organisation is a charity or not. Applying an activities test could impact on a charity's ability to manage its financial affairs responsibly by discouraging appropriate investment/reinvestment by the charity. We repeat the view raised in our submission on the *Better targeting of not-for-profit tax concessions* Consultation Paper that where profits of any activity are used in support of the organisation's charitable purpose, the activity should be treated as a related activity. The nature of activities carried on by an entity endorsed as a charity should not impact on the entity's status as a charity.

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?

YWCA Australia supports a charity definition that specifically allows the charity to advocate on behalf of those the charity seeks to assist, or lobby for changes in laws, policies and government decisions that have direct effects on a charity's dominant purpose.

We support changing the 2003 definition to reflect the High Courts' *Aid/Watch* decision by:

- altering the 2003 definition to remove from disqualifying activities, activities which are attempting to change the law or government policy (paragraph c of 2003 definition). This would mean that charities would be able to engage in 'political activities', as long as those activities are in furtherance and in aid of their charitable purpose.
- altering the 2003 definition to specify the meaning of political activities which is essentially activities that seek to change the law or government policy, or decisions of governmental authorities.

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

YWCA Australia supports changing the 2003 definition to prevent a charity from engaging in party political activities, such as supporting a candidate for political office even if the activity is ancillary or incidental. However, such a modification should be consistent with the principles expressed in the High Court's *Aid/Watch* decision.

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?

YWCA Australia supports 'the promotion of gender equality and diversity' being included in the list of charitable purposes.

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

Existing endorsements by the Australian Tax Office (ATO) should be transferred to the ACNC to minimise compliance costs (see also our response to question 7).

Depending on the final form of the definition, significant transition support (education and assistance) may be required.

More information

Thank you for the opportunity to provide this submission.

For more information please contact:

Dr Caroline Lambert
Executive Director
YWCA Australia
PO Box 1022 Dickson ACT 2602
Ph: 02 6230 5150