



**Submission by YouthCARE in relation to  
*A Definition of Charity* Consultation Paper**

## 1 Introduction

YouthCARE is the trading name of The Churches Commission on Education Inc., established by a broad group of Christian churches in WA in 1972. YouthCARE provides a broad range of services including school chaplaincy and Christian religious education.

We do this because YouthCARE believes our presence in public schools makes a difference to educational outcomes for students and the wellbeing of school communities.

YouthCARE is grounded in three core values:

- **Respect** - We recognise the context in which we exist and accept and honour the diversity of views among our own membership and in the communities we serve.
- **Compassion** - We reach out to others in need by providing holistic services aimed at inspiring hope.
- **Service** - We serve our members and educational communities, creating partnerships that rely on collaboration and recognise the contribution of others.

The Members of YouthCARE are:

- Anglican Church of Australia
- Australian Christian Churches - WA
- Catholic Archdiocese of Perth
- Churches of Christ in WA Inc
- Greek Orthodox Archdiocese in WA
- Presbyterian Church in Western Australia
- Uniting Church in Australia - WA
- Assemblies of Christian Brethren
- Baptist Churches in WA Inc
- Christian Outreach Centre WA
- Church of the Foursquare Gospel
- Lutheran Church of Australia - WA District
- Salvation Army

## 2 Summary of recommendations

1. Reforms should not be driven by the assertion that the sector is 'broken' and needs fixing.
2. Charity should be determined by reference to purposes, not activities.
3. The public benefit presumption should be retained in respect of stated categories of charity as the logical consequence of specifying these categories as things that are beneficial to the community.
4. Political activities should be permitted when done in furtherance of the charitable purpose of the organisation.
5. A single incident of illegal activity should not disqualify an organisation from being a charity.

## 3 Policy concerns

In proposing this change in direction for the regulation and management of the Charities and Not-For-Profit community sector, the Discussion Paper has not clearly demonstrated the magnitude of the problems it seeks to address. It implies that the sector is 'broken' and that in its current form the regulatory framework does not have the capacity to satisfactorily address and remove the beneficial status of organisations that are anomalous. YouthCARE is concerned that this unnecessary emphasis on the charitable sector being 'broken' does not reflect the reality of the sector in Australia which largely involves dedicated and compliant organisations seeking to effectively and efficiently achieve charitable

purposes. YouthCARE recognise that the sector can always be improved and welcome positive reforms, but are concerned to ensure that the underlying principle of the reform process is not that the sector is 'broken' and needs fixing.

The Minister's Foreword implies that the changes being considered 'will make it easier for the FNP sector to deliver their services for the public benefit'. He further asserts that such an improved framework will ensure that tax benefits and concessions will only be applied to worthy charitable organisations. Any reforms adopted by the Government must be a targeted response and world best practice as suitably adapted to Australian Charities and the regulatory environment in which they operate and act to improve the regulation of charities, and empower them to carry out their charitable purposes in a manner that is flexible and encourages innovation, rather than increase red tape and administration costs.

Statutory definitions of a charity already exist and work in concert with common law. The Discussion Paper has not made a case that these are insufficient for the current purposes. However, if the Government determines that a further statutory definition is necessary, YouthCARE is concerned to ensure that the definition of charity is not driven solely by tax policy considerations. The definition is proposed to be applicable for all Commonwealth (and hopefully also State and Territory) purposes and therefore needs to be a robust definition of what it means to be charitable, rather than a definition of what types of charitable entities should be entitled to tax concession. We recognise that there may be valid tax policy reasons for limiting the tax concessions available to some organisations or types of entities; however these measures should be included in the taxing statutes and should not prevent the organisation being characterised as a charity.

Given that the legislation arising from this consultation process will not commence until 1 July 2013, 12 months after the commencement of the Australian Charities and Not-for-Profits Commission (ACNC) it would be a mistake to miss the opportunity for the expertise of the ACNC, and the information it gathers, to be brought to bear on the drafting and policy intent of the proposed definition through the premature release on an exposure draft or bill, particularly in relation to public benefit and any change to the common law position. We therefore recommend the Government delay preparation and release of the exposure draft until the ACNC has had an opportunity to contribute.

The Government's announced starting point for the formulation of the definition of charity is the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations* (Charities Definition Enquiry or **CDI**), adjusted to take account of changes to the law affecting charities since that time. In this regard, the Board of Taxation *Consultation on the Definition of a Charity – A report to the Treasurer* dated December 2003 (**Board of Taxation Report**), following its review of the 2003 Charities Bill noted that the bill contains some departure from the CDI in this regard and consequently recommended substantial amendment to that bill. It is appropriate that these concerns be taken into account in determining an appropriate definition.

#### **4 Charitable Purpose**

A charity is, and must be, established for charitable purposes. Any non-charitable purposes of an organisation that are more than incidental or ancillary to the charitable purpose should act to prevent the organisation from being characterised as charitable. There is however, little benefit in determining whether it should be a 'dominant charitable purpose' or 'exclusively charitable purpose' – rather, it should simply be that a charity is an organisation with a charitable purpose (or more than one charitable purpose). Purposes that are incidental or ancillary to the charitable purpose should be disregarded in determining whether an organisation has purposes that are not charitable.

Further, it is vital that any statutory definition adopted is flexible enough to allow for innovation and change in the way charity is defined and recognised in society.

The determination of whether an organisation is charitable should be conducted by reference to the purposes of the charity only not the activities that it proposes to undertake to support those charitable purposes. In order to determine whether an organisation has a charitable purpose, the principal enquiry is whether the express objects of an organisation are charitable. If the express objects of an

organisation are charitable, then the organisation has a charitable purpose.<sup>1</sup> Where it is unclear from the objects of the organisation whether the purpose is charitable, in this situation it may be appropriate to look to its immediate activities in order to determine whether an entity in fact has a charitable purpose.

YouthCARE agree that it is appropriate for a charitable organisation that all activities undertaken by the charity must be in furtherance of the charitable purpose, and consider that this requirement should already be considered to be inherent in the determination of whether an organisation is charitable. An activity that raises funds for the charitable activities of the organisation is an activity in furtherance of the charitable purposes of the organisation.<sup>2</sup>

YouthCARE consider however that the inclusion of this requirement in the core definition of a charity confuses the distinction between purposes and activities.

## 5 The public benefit presumption

### 5.1 Categories established as being for the benefit of the public

*Pemsel's Case*<sup>3</sup> outlines four categories of charitable purposes. The public benefit presumption has historically applied in respect of the first three categories as these categories were listed on the basis that they were accepted as being for the public benefit, while for a purpose to fall within the fourth category ('other purposes beneficial to the community') it was necessary to show that the particular purpose proposed was a purpose beneficial to the community.

This presumption could be rebutted under common law by finding that, although the broad purpose was considered to be for the public benefit, specific purposes of organisations could fail to meet that requirement, such as being for private benefit, failing to provide a benefit, or being harmful or detrimental.

This situation is unchanged, even if a broader range of categories is adopted in the statutory definition, as the categories specifically adopted (with the exception of the final 'residual' category) will have been chosen on the basis that there is higher order acceptance that they are of benefit to the community. This is supported by the CDI<sup>4</sup> and the explanatory memorandum to the 2003 Charities Bill<sup>5</sup>.

Consequently, the public benefit presumption should be retained in respect of the stated categories of charitable purposes as the appropriate starting point for the inquiry into public benefit for the particular entity. This presumption can however, be rebutted by evidence to the contrary, showing that the organisation's purposes are not compatible with public benefit – that is, they are for private benefit, against public policy, unlawful, or harmful or detrimental.

### 5.2 Reversing the presumption

A change to the common law to remove the public benefit presumption will result in a need for new guidelines to be formulated by the regulator, and by the courts in appeals to decisions of the regulator, thereby giving rise to costs to both Government and the charities sector. In YouthCARE's opinion, the determination of whether something is for the public benefit is best left to the Judiciary to determine, rather than being determined by the regulator. In this regard we note that preparation of and consultation in relation to the huge volume of guidance on this topic prepared by the Charities Commission of England and Wales has resulted in high costs to both the regulator and the charities, and cannot necessarily be simply adopted in the Australian context.

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<sup>1</sup> *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Limited* [2008] HCA 55 at [38]

<sup>2</sup> *Word Investments* at [26]

<sup>3</sup> *Commissioners for Special Purposes of Income Tax v Pemsel* [1891-1894] All ER Rep 28

<sup>4</sup> *Report of the Inquiry into the Definition of Charities and Related Organisations* 2001 in chapter 16

<sup>5</sup> Explanatory Memorandum to the Charities Bill 2003 at [1.83]

A presumption will always exist one way or the other – either an organisation is presumed to be for the public benefit unless evidence is raised to the contrary<sup>6</sup>, or an organisation is assumed not to satisfy the public benefit requirement unless there is sufficient evidence to prove public benefit. Therefore it is either necessary for a charity (in all circumstances) to positively establish that they exist for the public benefit, or it is necessary for the regulator (in some circumstances) to show that an organisation that is assumed to be for the public benefit is not in fact for the public benefit.

In this regard, in YouthCARE's opinion it would be more appropriate to start from a presumption of public benefit and define the concept of 'private benefit' in the statutory definition as evidence that the public benefit is not satisfied. There is precedent in Commonwealth legislation for defining what constitutes a private benefit<sup>7</sup>, and formulating the definition in this way will allow the definition to adapt to the changing needs of society over time.

Ultimately, if the aim of reform is to improve regulation, reduce red tape and empower and encourage charities, reversing the presumption will not achieve these aims. Rather, it will shift the onus of proof in relation to public benefit from the regulator to the organisation along with the increased cost this will involve.

The suggestion in the Consultation Paper<sup>8</sup> that administrative costs to charities would be minor if the presumption was reversed, but will be higher to the regulator if the presumption is maintained, is ridiculous and shows misunderstanding of how the presumption applies. We question the wisdom of requiring any charity (but particularly an entity such as a start-up charity, suffering from a lack of resources) to bear a significant new administrative burden that has, until now, been borne by the regulator. Such a proposal runs counter to one of the stated aims of this legislative process, namely to reduce the compliance burden and administrative costs faced by the sector.

In considering overseas regulation and the way the presumption is treated in other common law countries, it should not be ignored that there are fundamental differences between the treatment of charities in Australia and the UK (such as the 'Gift Aid' and tax deduction available in respect of donations to all charities<sup>9</sup>). To impose the burden of a UK model through the removal of the presumption of public benefit without extending deductibility to all charities demonstrates an inconsistent approach to reform.

### **5.3 Charities for the advancement of religion or education**

There are some particular difficulties arising from a removal of the public benefit presumption in requiring organisations for the advancement of religion to prove public benefit, due to the often intangible nature of the benefits provided. It is difficult to positively prove the existence of benefits that are predominantly intangible, and also sometimes include indirect benefit. Further, changing world views in society mean that from time to time it could be difficult to positively establish public benefit if the prevailing view becomes that religion is wholly private or false.

In the case of religion, the benefit provided by religion includes the indirect, intangible benefit to the entire community through the presence in the community of spirituality and morality, not merely the direct benefits provided to the individuals who are part of the religious community. It may be difficult for an individual assessing an application to be truly objective and independent when determining whether the public benefit test is met due to the divisive and subjective views of religion in the community.

Consequently, it is preferable to define and characterise 'private benefit', and to allow public benefit to be presumed in relation to charities for the advancement of religion as well as the categories for the advancement of education and the other specifically stated categories outlined in the legislation.

YouthCARE are particularly concerned that allowing a determination of public benefit for organisations (particularly charities for the advancement of religion) to be made by a government body rather than the

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<sup>6</sup> Which is the common law position in relation to the stated heads of charity, that is, the relief of poverty, the advancement of education and the advancement of religion.

<sup>7</sup> Such as in the tax law

<sup>8</sup> Consultation Paper at paragraphs [79], [83] and [84]

<sup>9</sup> See for example *Income Tax Act 2007* (UK) part 8, chapter 2, sections 414-430

Judiciary will result in a limiting of organisations accepted as being for the public benefit and result in increased costs to charities to appeal such decisions.

We note that the reference to ‘cult like organisations’ in the consultation paper and the inference that the removal of the public benefit presumption would be beneficial in that such organisations would not qualify overstates the prevalence of cults in Australia and suggests that, if required to positively prove public benefit, all religious organisations will be judged from a starting assumption that it is necessary to be on the lookout for ‘cultish’ behaviour – thereby unnecessarily increasing administration costs for bona fide religious charities. While YouthCARE agrees that a cult should not be characterised as a charity, we consider that the potential existence of a small number of cult like organisations should not be the basis for overturning the presumption of public benefit in respect of charities for the advancement of religion as, where the evidence shows an organisation to be a cult, the presumption may be easily and cost effectively rebutted as being harmful or detrimental and therefore not for the public benefit.

Further, YouthCARE recommend the Government consider its international obligations to freedom of religion under the International Covenant for Civil and Political Rights and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.<sup>10</sup>

#### **5.4 Benefit**

Any determination of benefit should not be limited to benefits that are merely direct and present, but should include direct and indirect benefits; tangible and intangible benefits; present and future benefits; and benefits that contribute to either majority or minority views. Further, the determination of benefit should look to the purpose of the organisation, not the effectiveness of the organisation in achieving those purposes.

Any determination of whether something is for the public benefit should be determined as an objective test – that is, the consideration should be whether there is a public benefit, not whether the public perceives there to be a benefit. The former inquiry allows flexibility, particularly in relation to minority views, while the latter inquiry encourages only majority or popularly held views to be considered beneficial. History has told us that in many cases<sup>11</sup> it is the minority views that have ultimately resulted in real benefit to the community and there is great benefit within democracy in allowing dissenting voices to be heard.

The guidance in England and Wales in relation to public benefit extends the concept too far and in doing so arguably imports a ‘relief of poverty’ requirement in determining whether something is for the public benefit by requiring that, in order to be for the public benefit the services provided by a charity must be accessible to the poor. The implication of this in the view of the Charities Commission for England and Wales is that free services must be provided to a sufficient number of poor people in order to satisfy this requirement.<sup>12</sup> This view is not supported by the common law, which simply requires that the services must not be solely limited to the rich.

### **6 Political Advocacy**

Following the decision in *Aid/Watch*<sup>13</sup>, any political activity by a charity should be permitted when done in furtherance of the charitable purposes of the organisation.

Under our constitutional legal system, which includes the requirement for compulsory voting, it is appropriate for a charity to undertake political advocacy in various ways, including campaigning against

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<sup>10</sup> Articles 1 and 6, providing the right ‘to establish and maintain appropriate charitable and humanitarian institutions,’

<sup>11</sup> such as the Suffragette movement, the abolition of slavery and the rights of children

<sup>12</sup> Charities Commission guidance *Public Benefit and Fee-charging* December 2008. We note that the charities commission has recently withdrawn this guidance following the decision in the *Independent Schools Case*.

<sup>13</sup> *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42

a particular policy of a candidate or party, where such campaign is in furtherance of the charitable purposes of the organisation.

## **7 Illegal activity**

An organisation with unlawful purposes should not be characterised as a charity and such purposes should be taken into account in determining whether the presumption of public benefit is rebutted in respect of an entity.

The inclusion of an illegal activities disqualifier creating a once for all time test for the commission of an indictable offence is unduly restrictive and ignores the reality that an entity is ultimately operated by individuals. In this regard, we support the recommendation of the Board of Taxation to remove this requirement on the basis that it would disqualify a charity for all time following a single incident.<sup>14</sup>

## **8 Conclusion**

YouthCARE appreciates the opportunity to make this submission. If you have further questions in relation to any of our recommendations, please contact:

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<sup>14</sup> Board of Taxation Report 2003, recommendation 5.15, where the Board of Taxation recommended that this requirement be removed 'so that an instance of unlawful conduct would not disqualify an entity from obtaining or retaining charitable status.'