

TREASURY'S NOT-FOR-PROFIT REFORM FACTSHEET

INTRODUCING A STATUTORY DEFINITION OF 'CHARITY'

28 October 2011

AT A GLANCE

The Assistant Treasurer, the Hon Bill Shorten MP, today released a consultation paper for a statutory definition of charity. The consultation paper can be found at www.treasury.gov.au.

Submissions to the paper are due on 9 December 2011. Queries and submissions should be sent to NFPReform@treasury.gov.au.

KEY FACTS

The current definition of charity is based on over 400 years of common law.

In the 2011-12 Budget the Government announced that it:

- will consult on and introduce a statutory definition of 'charity'; and
- will provide the new Australian Charities and Not-for-profits Commission (ACNC) with \$2.9 million over four years to develop guidance, implement system changes for the definition and begin a process of re-assessing existing charities' eligibility against the new definition.

The definition will:

- apply for all Commonwealth laws;
- take effect from 1 July 2013; and
- be based on the 2001 *Report of the Inquiry into the Definition of Charities and Related Organisations*, the definition in the Charities Bill 2003 and taking account of the findings of recent judicial decisions such as *Aid/Watch Incorporated v Commissioner of Taxation*.

A great deal of work has been done through previous inquiries and reviews on resolving key aspects of a statutory definition of charity. The consultation paper seeks to address those aspects of a definition that remain unresolved.

The Australian Government is consulting with the States and Territories, with the view of improving uniformity between jurisdictions.

THE CURRENT DEFINITION

The current definition of 'charity' is based on over 400 years of common law, largely based on the Preamble to the Statute of Charitable Uses (known as the Statute of

Elizabeth), enacted by the English Parliament in 1601; *Commissioners for Special Purposes of Income Tax v Pemsel [1891-1894] All ER Rep 28* (Pemsel's case) and subsequent court cases.

The result is a definition which is unclear and confusing, does not meet the needs of contemporary Australian society, and does not necessarily reflect the diversity of organisations which operate for the public benefit.

THE FOUR HEADS OF CHARITY RESULTING FROM PEMSEL'S CASE

1. The relief of poverty.
2. The advancement of education.
3. The advancement of religion.
4. Other purposes beneficial to the community not falling under any of the preceding heads.

DETERMINATION OF CHARITABLE STATUS

- Currently: Australian Taxation Office (ATO) consideration is based primarily on the common law and applies at the Commonwealth level. Charities are required to self assess their eligibility for charity status on an ongoing basis.
- 1 July 2012: ACNC to register new entities based on current law. Charities endorsed by the ATO as income tax exempt will be transitioned to the ACNC at 1 July 2012 and will not need to re-register.
- 1 July 2013: ACNC to register new charities based on statutory definition of charity. Charities remain responsible for self-assessing their eligibility on an ongoing basis. The ACNC will review existing registrations over time.

PROCESS FOR CONSULTATION ON DEFINITION

- Submissions on the consultation paper are due 9 December 2011.
- The Government will also consult on exposure draft legislation (expected in the first half of 2012).
- Introduction of draft legislation into Parliament expected in mid-2012.
- Guidance on new statutory definition will be issued by the ACNC following passage through Parliament.
- The definition will come into effect on 1 July 2013.

FREQUENTLY ASKED QUESTIONS

What advantages will a statutory definition of charity provide?

A statutory definition of charity will:

- provide greater certainty and clarity as to what is considered to be charitable; and
- can be altered by Parliament over time, ensuring it remains appropriate, and reflects community needs and expectations.

Has there been previous support for a statutory definition of charity?

Recent reviews and inquiries have recommended defining charity in law. These include the:

- *Australian Future Tax System* report in 2010;
- Productivity Commission in its 2010 *Report Contribution of the Not-for-profit Sector*; and
- 2010 Senate Economics Legislation Committee report into the Tax Laws Amendment (Public Benefit Test) Bill 2010.

Why is the Government consulting on the presumption of public benefit?

Currently there is a presumption of public benefit for the first three heads of charity, as listed above.

The 2010 Senate Economics Legislation Committee report into the Tax Laws Amendment (Public Benefit Test) Bill recommended the presumption of public benefit be reformed as part of introducing a statutory definition of charity. The Government is consulting on this issue.

Although there is a presumption of public benefit currently, charities under the first three heads are still required to have and show the ATO their public benefit on application or request by the ATO.

The requirement to demonstrate an entity's public benefit will not change if the presumption of public benefit is removed, and it is unlikely that any additional information would be required beyond that which the ATO already requires.

Currently, for the first three heads of charity the onus is on the ATO to demonstrate that a charity does not provide a public benefit. Whereas for those that fall under the 'other purposes beneficial to the community' head of charity must positively demonstrate that they operate for a public benefit. Removing the presumption of public benefit will align all charities in needing to positively demonstrate their public benefit.

The sort of information that the regulator could consider in determining charitable status includes: information that the charity provides to the regulator (for example, in an entity's

annual reports); information that the regulator obtains on the charity from other sources; reports and assessments on the charity made by other government agencies (including regulators); and other relevant publicly available information.

The Government welcomes comments on ways to minimise the compliance burden.

Is the Government seeking to prevent charities from undertaking political advocacy?

No. In developing a definition of charity the Government is looking to build on the existing common law, taking account of recent developments in the common law. This includes the High Court decision in *Aid/Watch*, which states that generating public debate by lawful means about matters under one of the heads of charity is a purpose beneficial to the community.

The Government is consulting on the best way to include the *Aid/Watch* decision in the statutory definition.

Can I comment on areas of the statutory definition not covered by questions included in the consultation paper?

Yes. You can provide views on other parts of the definition, which will be considered as part of the consultation process.

The Government will build on the work done on the Charities Bill 2003, which contains the key common law principles of charity and charitable purposes. The development process resolved many of the key aspects of a statutory definition of charity.

Issues that remain unresolved include whether the presumption of public benefit should be overturned for some charities, and the level of political advocacy a charity can undertake.

What is the difference in the roles between the ATO and the ACNC with respect to charities?

From 1 July 2012 the ACNC will determine whether a new entity (for Commonwealth purposes) is a charity through a registration process. Existing charities, endorsed by the ATO as exempt from income tax will be transitioned into the new regime and will not need to re-register. However charities will still be required to review their charitable status on a regular basis. From 1 July 2013, the ACNC will begin to review the charitable status of existing entities over time.

The ATO will accept the ACNC's registration of charitable status, but will retain responsibility for determining eligibility to access Commonwealth tax concessions which are subject to special conditions.