



**Aged & Community
Services • Australia**

SUBMISSION TO THE TREASURY
ON
A DEFINITION OF CHARITY

DECEMBER 2011

Rob Hankins, President, Aged & Community Services Australia

Level 1, 11-19 Bank Place Melbourne 3000

Ph: 03 9670 5900

Fax: 03 9670 6400

Email: hwitham@agedcare.org.au

Aged and Community Services Australia

Aged and Community Services Australia (ACSA) is the national peak body representing not-for-profit (NFP) and faith-based providers of residential and community aged care and housing; and support for people with a disability and their carers.

ACSA is a federation with six State associations that provide direct support, advocacy and training for members. In total, ACSA represents over 1,100 church and charitable and community based organisations providing accommodation and care services to about 1 million older people, people with a disability and their carers.

Introduction

ACSA agrees that the meaning of charity can be confusing and unclear in the public's mind. We therefore support the recommendation of the Productivity Commission (PC) and others, that Australia should adopt a statutory definition of charity and that we need a clear framework for recognising entities as charitable.

ACSA strongly supports any measures that will result in harmonisation between Commonwealth and State and Territory legislation and regulation in relation to charities and that will reduce administrative costs for charities. To that end, we agree with the PC's recommendation that a definition of charity should be based on the recommendations of the 2001 Charities Definition Inquiry. More particularly, we largely agree with the definition in the Charities Bill 2003, as discussed below.

Our submission follows the structure used in the Treasury consultation paper and addresses the questions under each heading where relevant to ACSA's purview.

Not for profit status

That a charity must firstly be not-for-profit (NFP) goes without saying. However, as referred to at paragraph 48 of the Consultation Paper, the Charities Bill does not imply that an NFP organisation cannot generate a profit. An important principle is established in the Bill that allows activities to be undertaken which generate a profit, provided the profit is applied to the entity's charitable purposes.

In this regard, it is ACSA's view that tax determinations should continue to be applied at an entity level, not on an activity basis.

Dominant purpose

At face value, a requirement that an entity be 'exclusively charitable' has certain attractions. It has the appearance of simplicity but could involve hidden and unintended consequences depending on other considerations such as how 'unrelated business activity'¹ is defined and a charity's purposes versus its activities.

¹ Better targeting of not-for-profit tax concessions – Consultation Paper , May 2011

ACSA is concerned that the way in which a requirement that an NFP entity have no independent non-charitable purposes might be interpreted and applied in practice. The test of independence would need to be defined and the charitable status of particular business activities would no doubt come into consideration. In any event, that an entity's charitable status could be jeopardised by having a single non-charitable purpose, however minor, seems difficult to justify; it could simply trigger organisational restructuring to avoid any such potential.

Many ACSA members operate diverse businesses, combining residential and community aged care with health and housing, amongst other things. We would therefore oppose any changes that might limit innovation and growth and necessary flexibility, such as cross-subsidisation of activities.

ACSA therefore favours the retention of the 'dominant purpose' approach, combined with the test of business activities referred to in the earlier consultation on tax concessions², namely, the extent to which profits generated by business activities are applied to an entity's charitable purposes. Rather than considering dominant purpose in isolation, it is the combined effect of the Charities Bill's (currently) seven criteria for qualification as a charity that provides sufficient definition and public protection.

Peak Bodies

The decision by the NSW Administrative Decisions Tribunal may have provided guidance as to whether a peak body can be regarded as a charity but it is another court determined decision rather than a statutory one.

ACSA would prefer that the proposed statutory definition of a charity should cover all circumstances, including the status of a peak body. Peak Bodies that represent charitable service providers should continue to be charitable in their own right.

For the public benefit

ACSA has no fundamental issue with the removal of the presumption of public benefit. Not all entities established for the 'advancement of education or religion' are necessarily of public benefit. For example, some religious organisations and professional bodies have very restricted memberships and exist only for the benefit of those members. A single statutory test of public benefit should pose no threat to organisations that are genuine charities.

The 2010 Senate Inquiry referred to in the Consultation Paper proposed that a public benefit test contain the following principles:

- there must be an identifiable benefit arising from the aims and activities of an entity;
- the benefit must be balanced against any detriment or harm; and
- the benefit must be to the public or a significant section of the public and not merely to individuals with a material connection to the entity.

² ibid

The definition of 'public' should be broad enough to include distinct or isolated communities so as to make meaningful the notion of 'a significant section'. ACSA agrees with the Board of Taxation's recommendation that 'sufficient section' be defined as one which is not 'numerically negligible' compared with the size of that part of the community to which the purpose would be relevant.

This would act to include within the definition 'residents of a particular geographic area, the adherents of a particular religion, those following a particular calling or profession or sufferers of a particular disability or condition'.

Benefit

ACSA favours the non-statutory approach to a definition of public benefit adopted in England. As acknowledged in the Consultation Paper, such an approach offers 'flexibility, certainty and (has) capacity to accommodate the diversity of the sector.' The Australian Charities and Not-for-profits Commission (ACNC) could then provide guidance on the meaning of public benefit as does the Commission for England and Wales, namely that:

- the benefits must be related to the aims;
- benefits must be balanced against any detriment or harm;
- benefits must not be unreasonably restricted;
- individuals in poverty must not be restricted from benefit; and
- any private benefits must be incidental.³

The 2001 Charities Definition Inquiry recommended that the public benefit test be strengthened by requiring the purpose of a charitable entity to be altruistic. ACSA's view is that the charitable purposes of its members (the care and support of older people) are altruistic by their very nature. Nevertheless, an actual test of altruism could introduce another, potentially complicating, consideration in the definition of charity unless its meaning is kept very simple (perhaps a 'person in the street' approach).

The ACNC could have the role of determining the status of new applicants for charitable status, as well as periodic review of existing charities. The administrative requirements should be kept to a minimum, while providing sufficient public confidence in the process.

In this regard, there seems to be little gain in removing the presumption of public benefit, only to introduce a concept of self-evident benefit. According to the consultation paper, the consideration of what constitutes self-evident would be based on:

³http://www.charitycommission.gov.uk/Charity_requirements_guidance?Charity_essentials/Public_benefit/pbsummary.aspx

- information that the charity provides to the ACNC (for example, in its annual reports);
- information that the ACNC 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 self-evident test might be more efficiently applied in a periodic review of an entity's status but even then, the amount of information that could potentially be required (if all four of the above considerations were required) would be just as well gained in an equally involved demonstration of public benefit. Unless the self-evident test is very clear and simple (e.g. only one or two of the above requirements), ACSA sees little benefit in the concept.

Requiring every existing charity to demonstrate fully that they are for the public benefit could be an enormous task and would be unnecessary in ACSA's view. An alternative could be that once the ACNC is established it could develop a self-assessment tool for existing entities, perhaps drawing on a simple self-evident benefit test. Actual reviews of each organisation's status could be based on submission of the self-assessments and scheduled over an extended period. The reviews should be conducted on a risk managed basis, with priority given to those entities identified as having risk factors in relation to demonstrating public benefit.

Role of the ACNC

The ACNC is to be the central agency responsible for the administration of the definition of a charity and its attendant considerations. It should:

- establish a clear framework for determining and entity's charitable status and the periodic review of that status through a clear and simple test of public benefit;
- develop a self-assessment tool for existing entities and prospective applicants for charitable status;
- not duplicate or overlap with the role of the ATO;
- provide information and education material for organisations that covers topics such as governance, financial management and guidelines on the administration of relevant legislation (including definitions and any compliance related matters).

The proposed transition of existing charities to the new regime should occur over a sufficiently lengthy period so as to minimise or avoid any disruption to and unnecessary administration burden for the charitable sector. It will also be important the ACNC is given adequate time in which to establish itself and develop the necessary administrative and technical structures.

ACSA recommends that the definition of charity and related activities be finalised by the ACNC.

Activities to be in furtherance of charitable purpose

ACSA supports the principle that for an entity to be regarded as a charity, its activities should be in furtherance of its charitable purpose. The activities in themselves need not be charitable in nature, provided the entity is a charity and that property and any profits are applied for the charitable purpose.

Political Advocacy and the Aid/Watch case

ACSA agrees the Charities Bill 2003 should be altered to remove 'attempting to change the law or government policy' from the list of disqualified political advocacy. As held by the High Court in the *Aid/Watch* decision, the 'generation of public debate by lawful means concerning matters arising under one of the established heads of charity, is itself an activity beneficial to the community.'

Type of entity

The issue of concern to ACSA is the definition of a 'government body', given the Charities Bill includes in the definition, entities 'controlled by' government. The High Court decision in relation to *Central Bayside* may have served to clarify the definition but the matter should be made certain in the statutory definition of a charity.

Organisations such as ACSA's members are non-government, not-for-profit entities, despite the fact they receive significant government funding and are highly regulated. They are independently incorporated and/or constituted entities, which should be recognised in the statutory definition.

Charitable purposes

The list of charitable purposes in the Charities Bill 2003 and the *Extension of Charitable Purposes Act 2004* is appropriate except that the provision of aged care services by not-for-profit organisations should be expressly included as a category of its own, rather than as a sub-set of 'the advancement of social or community welfare'.

State and Territory issues

ACSA supports the longer term goal of a single statutory definition of 'charity' and 'charitable purpose' to apply across Commonwealth, State and Territory jurisdictions. We also agree that it would be preferable to describe an entity firstly as a registered charity before seeking to 'narrow those charities that are being identified as eligible for a tax concession.'

Transitional issues

Existing charities, endorsed by the ATO, should retain their status from the commencement of the new charities regime. As suggested above, and acknowledged as an option in the consultation paper, entities should be given the opportunity to self-assess their charitable status, subject to review of their registration by the ACNC over time.