



## Definition of Charity consultation

A Policy Briefing Paper prepared by AFAO

### Overview

The Government has released a Consultation Paper on the definition of charity. The Government announced in the 2011-12 Budget that it would introduce a statutory definition of charity, applicable across all Commonwealth laws from 1 July 2013.

The Government is seeking the views of stakeholders on a definition of charity and charitable purposes. The consultation builds on a range of previous inquiries including the 2001 Report of the Inquiry into the Definition of Charities and Related Organisations, the Charities Bill 2003 and recent court decisions including the High Court's decision in *Aid/Watch Incorporated v the Commissioner of Taxation*.

This consultation provides AFAO and its members with an opportunity to identify key issues in relation to the definition of charity such as the role of advocacy and political activity, which is pivotal to ensuring the continued effective community response to HIV.

This Consultation Paper outlines the background to a statutory definition, including previous recommendations and inquiries, as well as developments that have occurred since the 2003 consultation package on a charity definition was released. It discusses elements of a possible core definition of charity by raising for discussion possible refinements to the exposure draft of the Charities Bill 2003.

The Consultation Paper asks 20 questions, with four having particular relevance to AFAO and its members. These four questions are included below, with the entire list of questions listed in Appendix A. AFAO would be interested in members' views on any questions, and in particular in relation to the issue of protecting organisations' advocacy activities. We are keen to ensure that advocacy activities, core to the *raison d'être* of member organisations, are protected under any reformed definition of charity.

### Background

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.

According to the Consultation Paper, 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 are:

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.

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. The Government is consulting on removing the presumption of public benefit, arguing that all charities will then align in needing to positively demonstrate their public benefit.

## Issues

The Consultation Paper poses questions in relation to many aspects of the definition of charity. The remainder of this Briefing Paper focusses on key questions/areas.

## Peak Bodies

The Consultation Paper states that the Board of Taxation recommended that the workability of the Bill could be improved by clarifying whether or not peak bodies could be charitable.<sup>1</sup> In 2003, the New South Wales Administrative Decisions Tribunal held that a body which enhanced the long term viability of charitable organisations by providing educational mentoring and support services was itself a charitable institution. This decision indicates that while it is not necessary that a peak body deal directly with members of the public, it is the degree of integration and commonality of purpose with its members that determines its charitable status.

### **For consideration:**

AFAO supports clarifying the fact that peak bodies can be considered charitable organisations. The Consultation paper suggests that NSW Administrative Decisions Tribunal decision may have provided greater certainty on the circumstances when a peak body can be a charity and it may now no longer require further clarification. Do members feel that this is adequate?

The Consultation paper asks in relation to peak bodies at question 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?

<sup>1</sup> Page 8, available at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2161>

## Public (Benefit)

The Consultation paper states that the Charities Bill 2003 provided that an entity has a purpose which is for the public benefit only if it is directed to the benefit of the general community or to a sufficient section of the general community.<sup>2</sup>

It further clarified that if a purpose is not directed to the benefit of a sufficient section of the public if the people to whose benefit it is directed are numerically negligible (subsection 7(2)). In response, the Board of Taxation recommended that 'sufficient section' 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.

The Board of Taxation made this recommendation because of concerns that the wording could exclude organisations such as, independent schools in geographically isolated communities, an organisation catering for a small group of people who are profoundly deaf and legally blind, or a single person with a rare disease.

### **For consideration:**

AFAO is keen to ensure that any definition of 'public' is adequately flexible to incorporate disadvantaged/marginalised groups, regardless of size.

The Consultation Paper at question 3 asks whether there any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?

## Political Advocacy

The law until recently was that political advocacy was a disqualifying activity, if the purpose of the political advocacy is more than ancillary or incidental'. The High Court, in its 2010 Aid/Watch decision, changed the law when it held that 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. It also decided that there is no general doctrine in Australia that excludes political purposes from being charitable.

The Consultation paper suggests removing from disqualifying activities, "activities of the type which is attempting to change the law or government policy", though the organisation is still required to have a purpose which falls within the existing heads of charity. It proposes maintaining the ban on party political activities.

### **For consideration**

AFAO supports the proposal to enshrine the rights of charities to engage in political activities which attempt to change law or government policy. We are also keen to ensure that activities which are not party political, but relate to collecting and disseminating information in relation to elections or referenda are also protected. Providing information to constituents about political parties' policy

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<sup>2</sup> Page 9, available at: <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=2161>

platforms in relation to key issues, such as HIV prevention, is relevant to the interests of AFAO and its members.

The Consultation Paper asks at question 12 and 13, whether there are there any issues with the suggested changes to the Charities Bill 2003 as outlined above to allow charities to engage in political activities?

Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office or advocating a particular position during a referendum or other public period of debate?

## Appendix A: List of consultation questions

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?
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?
3. Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?
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?
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?
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?
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?
9. What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?
10. Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?
11. Should the role of activities in determining an entity's status as a charity be further clarified in the definition?
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?
13. Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

14. Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?
15. In the light of the Central Bayside decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?
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?
18. What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?
19. What are the current problems and limitations with ADRFs?
20. Are there any other transitional issues with enacting a statutory definition of charity?