



HammondCare

An independent Christian charity

8 December 2011

Manager
Philanthropy Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600
By email: nfpreform@treasury.gov.au

Dear Sir/Madam

“A definition of charity” – Consultation Paper, October 2011

Thank you for the opportunity to respond to the Treasury's Consultation Paper, October 2011 - "A definition of charity".

HammondCare is pleased to provide you with the attached response to the Consultation Paper. If you require further information regarding any of the views expressed in the attached, please do not hesitate to contact me.

Yours faithfully

Tara Michaels
Legal Counsel

HammondCare

Level 2, 447 Kent St, Sydney NSW 2000

P +61 2 8280 8444 • F +61 2 9267 3103 • E info@hammond.com.au • www.hammond.com.au

HammondCare is an independent Christian charity ABN 48 000 026 219

**A DEFINITION OF CHARITY
CONSULTATION PAPER OCTOBER 2011
RESPONSE BY HAMMONDCARE**

Introduction

HammondCare is an independent Christian charity that was founded in 1932. Each day, we serve more than 2,600 people with complex health or aged care needs, regardless of their circumstances, in sub-acute hospitals, residential aged care facilities and in their own homes. We are considered leaders in dementia care and palliative care.

HammondCare's annual revenues in FY11 were \$140m making it one of the 50 largest Australian charities by revenue.

HammondCare is a public benevolent institution and a deductible gift recipient.

With now almost 80 years' experience operating as a charity in Australia, HammondCare is well placed to contribute to the current national discussion regarding the future direction and regulation of the Australian charitable sector, particularly in relation to any changes to the way in which charities are defined. HammondCare continues to support the new approach signalled by the signing of the National Compact in March 2010 by the Government and the not-for-profit sector to work together, including to reduce red tape and streamline reporting requirements. HammondCare has welcomed the reform measures already undertaken since then to establish an Office for the Not-for-profit Sector within the Department of Prime Minister and Cabinet and to create the Not-for-profit Reform Council. And, HammondCare particularly looks forward to the new Australian Charities and Not-for-profit Commission (**ACNC**) coming online from July 2012. The establishment of the ACNC by the Australian Government marks a most important step in the implementation of the Government's reform agenda which includes the reduction of the overall regulatory burden on the sector.

Summary of recommendations

- 1. HammondCare welcomes the development of a statutory definition of charity but is concerned that the current timetable for its introduction does not allow the ACNC to contribute to its formulation.**
- 2. Any statutory definition of a charity must be purpose based.**
- 3. The public benefit presumption should not be abandoned.**

Keeping apace with change – ACNC should contribute to the definition of charity

While HammondCare commends the Government's determination to carry out reform in the not-for-profit sector in a timely manner, we also urge the Government to ensure that there is sufficient time between steps within the reform process to ensure that the best outcomes are achieved. It is currently proposed that the legislation arising from this consultation process will commence on 1 July 2013, 12 months after the commencement of the ACNC. This timetable does not permit any input from the ACNC. We consider it important that the new regulator has an opportunity to contribute its expertise to shaping the legislation which it will be responsible for administering and enforcing. This is especially critical to the extent that the legislation proposes any modification to the current common law position in relation to public benefit as this will undoubtedly impact on the ACNC's regulatory burden. In these circumstances, **HammondCare recommends the Government delay preparation and release of the exposure draft legislation until the ACNC has had opportunity to become established and to contribute to the formulation of the definition of charity.**

Charities are defined by their purpose, not their activities

The purpose of an organisation must remain the primary determinant of its charitable status and not its activities. The fundamental point of difference between not-for-profit and for-profit entities is their purpose. What makes a charity a charity is its purpose – it is the “why” not the “how” of what they do. HammondCare’s own organisational objectives and activities demonstrate this point. HammondCare exists as an independent Christian charity to improve the quality of life of people in need (particularly those suffering from dementia or needing palliative care) and people who are financially disadvantaged. The individual activities in which HammondCare engages across the organisation are extensive and varied and some may, in isolation, not appear to be demonstrably charitable.

Within the context of HammondCare’s residential aged care business, for example, HammondCare cares for a mix of residents, both those who are financially disadvantaged and those who have financial means: dementia affects people regardless of their financial means. Across these services, the average percentage of residents who are financially disadvantaged is 40%. In some locations, the percentage of financially disadvantaged residents is closer to 60% whereas in other areas that percentage is lower. HammondCare offers care regardless of financial circumstances but those who are financially *advantaged* make it possible to continue the service for all, particularly those who cannot meet the costs of their care.

Similar diversity is also essential to the sustainability of HammondCare’s health and hospitals services. HammondCare operates a number of sub-acute hospitals at a loss. It also operates day clinics for patients, regardless of whether they hold private health insurance. Some of these clinics may return a surplus; others may not.

In each of these cases, however, HammondCare’s activities demonstrably support the achievement of its charitable purposes. **Neither the financial outcome of such activities nor the activities themselves should be determinative of HammondCare’s charitable status. Seeking to define charities by reference to their activities will, in our view, only be productive of increased complexity and confusion.**

Imposing a requirement that an organisation’s purpose or purposes be *exclusively* charitable, will restrict the social contribution of charities. Any statutory definition of charity needs to be sufficiently flexible to give charities scope to be innovative and creative about how they achieve their charitable aims. For example, HammondCare is recognised internationally for its leadership in demonstrating and promoting best practice dementia care. HammondCare currently provides dementia care both in specialised residential aged care facilities as well as in people’s homes. In addition to the delivery of dementia care, HammondCare is also engaged in and promotes thought leadership in dementia treatment, aiming to push the boundaries of thinking to develop better practice outcomes. To that end, HammondCare established a Dementia Centre as an activity which undertakes cutting edge research and evaluation and disseminates resources to the community to support best practice in dementia care. That Centre has an annual conference as part of its activities. From year to year, the operation of The Dementia Centre may generate a surplus or incur a loss. Each of these examples of activities undertaken by HammondCare might not, when divorced from the organisation’s overall purpose and the balance of its undertakings, be characterised as charitable. Does this mean that HammondCare’s purpose is not *exclusively* charitable? We would maintain that these activities are integral to how we operate and how we provide public benefit. But some might argue that it does mean that HammondCare has activities whose purposes are incidental or ancillary to its charitable purpose. **As is the case under the common law, purposes of a charity which are incidental or ancillary to its charitable purpose should not operate to exclude an organisation from charitable status.**

The public benefit presumption should not be abandoned

The public benefit presumption is beneficial

The rebuttable presumption of public benefit in respect of the first three of the four categories of charitable purposes in *Pemsel’s Case*¹ has been an established aspect of the way in which charities have been defined for over a century. The presumption has served the not-for-profit sector well. The

¹ *Commissioners for Special Purposes of Income Tax v Pemsel* [1891-1894] All ER Rep 28

public benefit presumption under the first three *Pemsel* heads currently operates to detect and punish deviations from the legal standard, that is, the presumption stands unless and until there is reason to question it. This is not unlike the way in which our law operates in many other spheres, including for example, income tax where the ATO audits individuals or companies either at random or where their returns are suspicious or unusual. The current approach saves the administrator (now the ATO, but in future the ACNC) from the very burdensome and resource intensive task of assessing each existing or new organisation's charitable credentials and determining whether or not they deserve charitable status. It also relieves existing and new charities of the costs and administrative burden of proving its charitable status. The suggestion in the Consultation Paper that the reversal of the presumption will result in minor initial compliance costs is not substantiated. To introduce a statutory definition of charity which requires all existing and new charities to prove their public benefit would suggest that the majority of charities are unscrupulous. It also 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 any event, 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 contrary², 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 it exists 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.

Reversing the presumption is contrary to the Government's stated policy aims

The determination of public benefit is a complex process. It should not, we would suggest, be a significant function of the ACNC to engage in an examination of the public benefit claims of each and every charity it oversees. The experience of the Charities Commission of England and Wales is instructive in this respect. It has had to develop a very substantial volume of guidance for the purposes of determining public benefit resulting in significant costs to both the regulator and charities. This body of material, while no doubt useful, cannot simply be adopted wholesale in the Australian context. Ultimately, if the aim of the Government's reform program is to improve regulation, reduce red tape and empower and encourage charities, reversing the presumption will not achieve these aims.

Charities for the advancement of religion

Particular difficulties arise if the presumption of public benefit is removed for charities for the advancement of religion. The question of public benefit in this context is a complex one as the benefits which faith-based charities provide are real but, by their very nature, often intangible. We note that the Report of the Charities Definition Inquiry affirmed that the advancement of religion should continue as a head of charity. That Inquiry recognised that organisations which have a dominant purpose of the advancement of religion are for the public benefit because they aim to satisfy the spiritual needs of the community by providing systems of beliefs and the means for learning about these beliefs and putting them into practice.³ There is no basis on which now to suggest that the presumption of public benefit for faith based charities should be disturbed. Moreover, in considering the position of faith based charities under any statutory definition of charity, the Government should be mindful of Australia's international obligations under the International Covenant on Civil and Political Rights and the United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination which supports the freedom of individuals and organisations "to establish and maintain appropriate charitable and humanitarian institutions".⁴

Charities can (and have a responsibility to) engage in advocacy

In line with the High Court's decision in *Aid/Watch*⁵, any political activity by a charity should be permitted when done in furtherance of the charitable purposes of the organisation.

² This 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.

³ Report of the Inquiry into the Definition of Charities and Related Organisations, page 178

⁴ United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Articles 1 and 6

HammondCare believes that political advocacy is a necessary component in order to achieve its charitable purposes. When the very people you exist to serve are vulnerable and often marginalised in our society, advocating on their behalf to achieve better social outcomes is essential. For example, HammondCare has engaged and continues to engage in debate around issues of equity of access to aged care and hospital services. Recently it successfully supported a campaign to re-instate State Government funding of community palliative care services in Northern Sydney. HammondCare also actively lobbies government to support the development of new initiatives for those whose care needs are not being met by the available services. For example, HammondCare continues to advocate on behalf of the needs of young people suffering with dementia.

Summary of recommendations

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