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16 December 2011

Manager
Philanthropy and Exemptions Unit
The Treasury
Langton Crescent
PARKES ACT 2600

By post and by email: nfpreform@treasury.gov.au

Dear Sir / Madam

A Definition of Charity Consultation Paper

We are pleased to provide our response to the consultation paper issued by The Treasury in October 2011 entitled "A Definition of Charity".

We believe that enacting a statutory definition for charities is a fundamental step in the overall reform of the Not-For-Profit sector and will provide certainty to charities with respect to the activities they may perform without placing their charitable status at risk.

We deal with and are involved in the Charity and Not for Profit sector on a daily basis and welcome this opportunity to participate in this important regulatory reform.

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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?**

PwC considers that the dominant purpose test in the Charities Bill should be maintained and not be replaced with an exclusive charitable purpose.

In our view, it would be difficult for many charities to demonstrate that they have an exclusive charitable purpose, especially having regard to the difficulty in defining, and reaching a public consensus of, the precise meaning of charity – as evidenced by this consultation process and the experience overseas.

An exclusive charitable purpose requirement would, in our view, be overly restrictive and onerous on charities and may affect efforts to raise funds and awareness of a charity and conduct activities that, whilst may not be intrinsically charitable, support a charitable cause.

For instance, it is very common for charities to conduct small-scale, ancillary or incidental commercial activities or hold passive investments. Such activities, whilst not directly charitable, may still support the main charitable causes of the entity by applying profits to further those charitable causes. This common practice may be prevented under an

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exclusive charitable purpose requirement, however these activities are usually vital to funding or raising awareness of the organisation's charitable activities.

Whilst we support a dominant purpose test we agree that any non-charitable purpose should only be incidental or ancillary to the main charitable purpose of the entity and a charity should not have an independent non-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?**

We would support a change to the definition of charity in the Charities Bill to make it clear that a peak body can be a charity consistent with the decision of the Administrative Decisions Tribunal in the *Social Ventures Australia* case. Given that the definition of charity will be legislated it is important that the legislation recognises that a peak body can be charitable in line with the *Social Ventures Australia* decision.

3. **Are any changes required to the Charities Bill 2003 to clarify the meaning of 'public' or 'sufficient section of the general community'?**

As contemplated in the consultation paper, we consider that an entity should not be excluded from obtaining charitable status merely because the number of people to whose benefit the charity is directed is small. As the consultation paper notes, there could be situations where a genuine charitable organisation only assists a small number of people. Examples include sufferers of rare diseases, those living in poverty in small and remote communities, people with disabilities, indigenous health issues, recipients of educational scholarships and necessitous circumstances funds.

Further, there may be cases where a charity only appears to assist a small number of individuals but, as a result of assistance to those individuals, the charity has positive flow-on effects on a wider community. For example, an organisation that assists only a handful of individuals living in poverty in a remote community - Assistance provided to such individuals could turn them into role models and leaders for the community and help inspire others in their community to realise their full potential and help break the cycle of poverty and self-destructive behaviour.

We would support an amendment to the Charities Bill to clarify that in determining whether the people to whose benefit the charitable purpose is directed are numerically negligible, regard must be had to the size of the relevant section of the community to whom the purpose would be relevant and the aims and objects of the charity and whether the charity's activities will, either directly or indirectly, have a wider charitable effect on a larger group of people or wider community. Importantly, an organisation should not be excluded from being a charity merely because, on the face of it, the organisation only appears to directly assist a small number of people.

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?**

We agree with the comments made in the consultation paper that an organisation should not be denied charitable status merely because of familial ties between its members or

beneficiaries, provided that the public benefit test is still met. The Charities Bill should be amended to ensure that this is clear, specifically, the public benefit definition.

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?**

Further guidance as to the meaning of the term "for the public benefit" should be provided in the Charities Bill. Each element in section 7 of the Charities Bill in relation to the meaning of public benefit should be elaborated. Such elaboration should be in order to expand rather than restrict the definition.

For instance, the Charities Bill should state that "practical utility" should be interpreted widely to include charities which provide intangible social, mental, cultural or spiritual benefits.

We consider that section 7(1) of the Charities Bill referring to the aim of achieving "a universal or common good" has the potential to cause confusion and may need elaboration or examples to be included. This requirement may, in fact, be unnecessary given that a charity must have a charitable purpose. It would be unusual if a charity is accepted to have a charitable purpose but, at the same time, is not aimed at achieving a universal or common good.

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?**

In our view, if charity is being defined in statute, it is appropriate to also define the essential and required elements or characteristics of a charity. Therefore, we consider that, subject to our comments above, public benefit should be defined in the Bill. However the definition of public benefit should not be too restrictive. Examples should be provided and, in this regard, we consider that regulations under the Act will need to be made to include examples of public benefit. The regulations can then be amended over time to keep pace with public consensus of what constitutes "for the public benefit".

The greater the degree of clarity and certainty that can be achieved by the legislator in drafting the definition of what is a "charity", the greater certainty this will give both existing and future charities. The Courts should only be required to interpret on its proper construction the intention of the legislation.

Accordingly, we submit that examples of what is or is not a charity in the legislation will help guide both industry participants, regulators and, as is necessary, the judiciary.

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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?**

Subject to our comments above in relation to defining "public benefit", PwC agrees that charities should be for the public benefit and charities should be able to demonstrate that they are for the public benefit unless the charity clearly falls within an accepted category of charity (i.e. the first three charitable heads under the *Pemsel* case) or it is otherwise self-evident.

As many charities have limited resources, existing charities should be grand-fathered for a period of time, so that they do not need to reapply for charitable status with the relevant regulatory bodies. However, a regular review program should be in place to ensure that those existing charities continue to meet their original charitable objects and they can demonstrate that 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?**

PwC considers that ACNC should play a key role in the Not-For-Profit sector to provide guidance and assistance to charities in terms of demonstrating that the charity meets the public benefits test. Many charities have very limited resources including limited funds, time, human resources and legal expertise and therefore the ACNC should play a leading consultative role to assist charities demonstrate that they meet the public benefit test.

In addition, we are of the opinion that the requirements that the ACNC should put in place should be reasonable so that charities are not required to spend disproportionate amounts of time or funds (which should be focused on charitable activities) on fulfilling such regulatory obligations

We consider that it may be unreasonably onerous for charities to continue to actively demonstrate to ACNC that they meet the public benefits test, after they have already done so. Instead, there could be a requirement for a charity to notify ACNC if it no longer meets the public benefits test and/or they should be required to file a form with ACNC each year with a statement that the charity continues to meet the test. In addition, we recommend that the ACNC puts in place an ongoing monitoring program whereby ad-hoc checks of charities are made to ensure that registered charities continue to meet the public benefit test.

9. **What are the issues for entities established for the advancement of religion or education if the presumption of benefit is overturned?**

Refer to our comments above for question 7.

10. **Are there any issues with the requirement that the activities of a charity be in furtherance or in aid of its charitable purpose?**

We agree with a requirement that the activities of a charity be in furtherance or in aid of its charitable purpose.

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Occasionally, it may be unclear whether a charity's particular activities further or aid its charitable purpose. For instance, a charity may, for a number of years, accumulate profits to develop and improve its charitable activities and expand its reach. Such activity may still further or aid its charitable purpose, but may come at the expense of short-term direct charitable assistance. For this reason, it may be useful for the legislation to retain flexibility in terms of this requirement.

11. **Should the role of activities in determining an entity's status as a charity be further clarified in the definition?**

PwC considers that there must be some connection between the purpose of a charity and its activities. If none of an organisation's activities fulfil, further or promote its charitable purpose, the activities of the organisation could be said to be contrary to the organisation's charitable purpose.

That said, it should be noted that a charity's activities may not always be intrinsically charitable. This should not result in a charity losing its charitable status. For example, some health-related charities conduct sport and fitness activities which are not, in and of themselves, charitable. However, where the sport and fitness activities are used to promote healthy living and lifestyles to assist children suffering from obesity and weight-related diseases or are targeted toward those in remote disadvantaged communities to assist in breaking the cycle of poverty, this type of activity is charitable.

In addition, a charity should not lose its status if it engages in non-charitable activities, such as nominal commercial or passive investment activities, provided that any funds arising from such activities are applied for the charitable purposes of the organisation. This is consistent with the decision in *Word Investments*.

It may not be appropriate to legislate as to charitable activities because a charity's activities should "speak for themselves" and also because a charity could achieve its charitable purpose in many different ways. In most cases, it should be self-evident whether a charity's activities are fulfilling the charity's purpose.

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?**

Political Purpose / Activities

PwC considers that an organisation which has, as one of its main purposes, advocating a political party or cause, supporting a candidate for political office or attempting to change the law or government policy should not be given charitable status. As highlighted in the consultation paper, these purposes are not ordinarily charitable in nature and raise issues of independence and electoral fundraising laws.

However, the Charities Bill should not restrict a charity from:

(a) engaging in the above activities if it is in furtherance or aid of its charitable purposes and the activity is ancillary or incidental to its main activities; or

(b) engaging in activity of the type found in the *Aid/Watch* decision to be charitable, that is, generating public debate with a view to influencing law or government policy in relation to a charitable purpose.

Section 8(2)(c) of the Bill may require amendment to ensure it does not overturn the High Court's finding in the Aid/Watch decision.

Unlawful Purpose / Activities

PwC considers that the Charities Bill should not include a provision to the effect that an organisation will not be a charity if it engages in unlawful activities or has an unlawful purpose.

First, we do not see how a charity would obtain endorsement if it has an unlawful purpose. Secondly, if an organisation engages or proposes to engage in unlawful activity, such conduct would be addressed by existing laws and the organisation would be subject to penalties accordingly.

In addition to the above, if the provision in the Charities Bill extends to unlawful activities this would have the effect of causing an organisation that is a charity to lose its status for any breach of the law. This could be for something as minor as failing to lodge a form by a particular due date which may be deemed to be "unlawful'. Clearly, this is not a proper outcome and would not be the intention of the proposed law.

If a charity does breach a particular law it will be culpable under that law, but should not lose its charitable status. The ACNC may wish to have the power to suspend an organisation's charitable status where the organisation is deemed by law to have engaged in certain serious misconduct, however we are of the opinion that such suspension should not be automatic and should be at the discretion of the ACNC.

14. **Is any further clarification required in the definition on the types of legal entity which can be used to operate a charity?**

Other than our comments below, in our view, the definition does not require further clarification. In addition, we agree with the Board of Taxation's view that the term partnership should be clarified so that joint ventures are not excluded from being a charity. Joint ventures are a common and appropriate way for charities to structure activities with other partners and enables each party to contribute resources and expertise to a particular project.

15. **In the light of the *Central Bayside* decision is the existing definition of 'government body' in the Charities Bill 2003 adequate?**

As noted in the consultation paper, the current definition of "government body" in the Charities Bill does not specify that local governments are included in the definition of government body. Therefore the definition should be extended accordingly.

PwC would support further guidance within the Charities Bill as to when a body is considered to be "controlled" by a government entity. Arguably, some charities are indirectly controlled by a governmental authority because they rely heavily on funding from that governmental authority; are influenced in terms of which particular charitable activities those funds are applied toward; and/or have government employees on the board of the charity. In our view, there should be more than these factors alone in order to constitute control.

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?**

PwC considers that the list of charitable purposes in the Charities Bill should set out, in full, the accepted common law position. If the legislation does not expressly list all of the purposes which the common law has accepted to be charitable, this may lead to confusion and a presumption that such purposes are not charitable for the purposes of the Charities Bill.

The definition of "advancement" in section 10(2) of the Charities Bill should be amended to include "prevention".

Under the charitable head "other purposes beneficial to the community", the Charities Bill should provide that this includes those items listed in paragraph 126 of the Consultation Paper which are recognised as charitable under the common law.

We do not consider that the Charities Bill should list those purposes which the common law has held not to be charitable. From our perspective, this would cause greater confusion and a potential for overlap – e.g. whilst sports is not a charitable purpose, an organisation that promotes health by arranging sports can be a charitable purpose.

18. **What changes are required to the Charities Bill 2003 and other Commonwealth, State and Territory laws to achieve a harmonised definition of charity?**

We are in favour of a harmonised definition of charity to avoid confusion across the various jurisdictions, to achieve national uniformity and to reduce multiple levels of compliance. However, a harmonised definition may have unintended consequences. For instance, when enacting certain State and Territory legislation Parliament may have intended a specific definition of charity (different from that proposed under the Charities Bill) for the purposes of that legislation. Harmonising State and Territory legislation with the Charities Bill definition of charity will need to be introduced over time (or the current definitions grandfathered) to allow the various States (and their respective charities) time to consider and take relevant action to deal with any unintended consequences.

We also consider that harmonisation is required in respect of public fundraising activities. Currently, each State and Territory has its own laws and licensing requirements for public fundraising activities engaged in by charities. For instance, in New South Wales, the relevant legislation is the Charitable Fundraising Act 1991 (NSW) which is administered

by the NSW Office of Liquor, Gaming & Racing. Whilst in Victoria, the relevant legislation is Fundraising Act 1998 (Vic) which is administered by Consumer Affairs Victoria.

This creates an unnecessary regulatory burden, compliance difficulties and increased costs for the numerous charities in Australia that operate and collect funds on an inter-state or national basis. PwC would support a national public fundraising law and licensing regime to replace the various State and Territory laws.

19. **What are the current problems and limitations with ADRFs?**

As noted in the consultation paper, an Australian Disaster Relief Fund is limited to providing funds to one specific disaster. In other words, an ADRF cannot be established to assist generally with disasters as they occur from time to time.

The nature of disasters is that there are generally unforeseen and unpredictable. Financial assistance for victims and rebuilding efforts following a disaster is usually required immediately upon and following the occurrence of the disaster. The current framework prevents the establishment of a disaster relief fund in advance.

Under the existing regime, a fund needs to be established (often requiring the person establishing the fund to obtain professional advice, such as legal advice), complete the application and be endorsed by the ATO, raise money from the public and finally provide money for the relief of people affected by the disaster. This process takes time and can therefore create a material delay between the time of a disaster and the time when victims and affected communities actually receive assistance.

PwC is in favour of a new regime to allow ADRFs to be established to provide funds for any Australian disaster as they occur from time to time or a specified category of Australian disasters (e.g. bushfires, floods or disasters that occur in specific regions in Australia). This would create an opportunity for people to donate funds in advance of, or immediately following, the occurrence of a disaster and reduce the delay in providing urgent support to victims of disasters.

Under this new regime, controls must be implemented in order to ensure an ADRF does not accumulate large sums of money without using the money for disaster relief efforts. For example, an ADRF could be required to use a specified proportion of its funds each year in respect of Australian disasters. If the ADRF does not use those funds (e.g. in the unlikely event that the fund has accumulated more money that it can use or because an Australian disaster has not occurred), it could be required to donate the funds to another charity that has been endorsed by the ATO.

20. **Are there any other transitional issues with enacting a statutory definition of charity?**

In our view, it would be unreasonable for existing charities to be required to demonstrate immediately that they meet the new eligibility criteria. This would cause a significant burden for many charities that have properly applied the existing laws and require them to invest time and funds to effectively "re-register" their organisation as charities, duplicating work originally performed when the charity was established.

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We consider that existing charities and organisations that submit applications for endorsement prior to the commencement date of the proposed Charities Act be grand-fathered under the new legislation. This would ensure existing charities do not have to re-assess their eligibility under the new rules for a period of time. We consider that the grand-fathering provisions should last for a minimum of 10 years. Whilst this period may seem lengthy, given that the statutory definition is effectively codifying (and potentially altering) over 400 years of case law, in our view an extended grand-fathering period is appropriate. This would also allow time for courts to interpret and apply the new law, if necessary. However, over time existing charities and organisations must be required to move towards meeting the new statutory definition of a charity so that, in the long term, there will be a level playing field for all charities with respect to the statutory framework they will be required to abide by.

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We would welcome the opportunity to discuss our views. Please contact me on (02) 8266 6410 should you wish to discuss any of the matters we have raised.

Yours faithfully,

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