



14 December, 2011

The Manager
Philanthropy and Exemptions Unit
Personal and Retirement Income Division
The Treasury
Langton Crescent
PARKES A.C.T. 2600

Treasurer
Minister for Workers'
Rehabilitation
Minister for Defence
Industries
Minister for Veterans'
Affairs
State Administration Centre
200 Victoria Square
ADELAIDE S.A. 5000
G.P.O. Box 2264
ADELAIDE S.A. 5001
D.X. 56203 Victoria Square
Tel (08) 8226 1866
Fax (08) 8226 1896
treasurer@sa.gov.au

Thank you for the opportunity to make a submission on the Commonwealth's consultation paper "A Definition of Charity" dated October, 2011.

It is understood that the long term objective of a statutory definition of "charity" is to achieve a single meaning of the term charity across all jurisdictions and across all levels of government. It is also understood that a statutory definition is intended to assist in reducing the administrative burden for charities operating across a number of different jurisdictions.

The South Australian Government supports reforms that reduce the administrative burden or uncertainty for charities in undertaking their charitable purposes.

In response to the Commonwealth Government's request for submissions, the South Australian Government would like to provide the following comments on the proposed definition of "charity":

- a) A government body should not be explicitly excluded from the definition of 'charity'. There may be government bodies that meet the criteria for a charity and these bodies should be classified as such.
- b) It is unclear how the proposed statutory definition of "charity" will interact with:
 - entities that may not be a charity in their own right but have a charitable purpose or hold property for a charitable purpose, and
 - deductible gift recipient (D.G.R.) status.

Government body

Government bodies and the trusts that they administer should not be explicitly excluded from being able to meet the charity definition.

Excluding all "government bodies" regardless of whether the organisation meets the broad elements of a charity is likely to create uncertainty where an entity may technically be deemed a government entity but have been established to undertake a charitable purpose.

For example, Health Advisory Councils (HACs) are incorporated under the Health Care Act 2008 (SA) as advisory bodies to S.A. Health. HACs also have health advocacy and advisory

functions on behalf of their local community and in relation to the management of local hospital sites. They are defined as Crown instrumentalities and may hold property on behalf of the Crown, but they also hold property on trust for charitable purposes (including testamentary bequests given for the benefit of their local hospital) and collect donations for their local hospital. HACs are managed on a volunteer basis by local residents and professionals for the benefit of their local communities.

The constitutions of HACs provide for fund-raising and for the establishment of gift funds.

There are likely to be a range of other entities in the public sector, in both South Australia and other jurisdictions that could be adversely affected by the explicit exclusion of 'government entities' from the definition of charity.

The consultation paper cites certain dicta in the High Court decision in the Central Bayside case to support its broad contention that government bodies cannot be charities and governmental purposes are not charitable.

It is the view of the South Australian Crown Solicitor's Office that there is no settled case law on this and that there are numerous instances in which courts have upheld gifts to government entities as charitable, including in:

- *In re Padbury v Solicitor-General* (1908) 7 C.L.R. 680
- *Public Trustee of Queensland and Golden v State of Queensland* [2004] Q.S.C. 360
- *In re Harding (Deceased)* [1960] N.Z.L.R. 379
- *In re Cain (Deceased)* [1950] V.L.R. 382
- *In re Morgan's Will Trusts* [1950] 1 Ch. 637
- *Re Sutherland Deceased* [1954] Qd. R 99

The discussion paper queries whether the existing definition of a government body in the Charities Bill 2003 is adequate. While the Government does not believe that a definition is required (for the reasons outlined below) we do believe that a definition of government body would need to be much more detailed than that presently suggested.

Charitable purpose

The paper is not clear on how the proposed arrangements will apply to a non-charitable entity that manages, for example, a charitable trust. It is considered appropriate that the charitable trust be treated in a similar manner as a "charity" for tax purposes and that the treatment of the charitable trust should not be affected by the structure of the trustee (a non-charitable entity).

This issue requires clarification, particularly if the proposed charity definition continues to exclude a "government body" from the ambit of a charity. This highlights the problem with defining a charity only by its structure as opposed to what it does.

Defining a charity by its structure is likely to create definitional issues over time and therefore add to uncertainty for some charitable institutions, particularly where ownership structures

may change (between government/non-government etc) but the purpose of the organisation remains the same.

In South Australia, the Collections for Charitable Purposes Act 1939 (SA) licenses the collection for a charitable purpose which is defined under section 4. Under the Collections for Charitable Purposes Act 1939 (SA), it is the activity that is relevant and provides the criteria for eligibility for a charity licence. It is not the structure of the entity that determines if it can be licensed to collect.

A charity should be defined exclusively by its functions, that is, what the charity does rather than by its structure.

Deductible Gift Recipient (D.G.R.) status

To receive income tax deductible gifts, an organisation must be a deductible gift recipient (D.G.R.). Donors can claim income tax deductions for gifts to D.G.Rs in their income tax returns, but there are rules about what sorts of organisations can claim D.G.R. status.

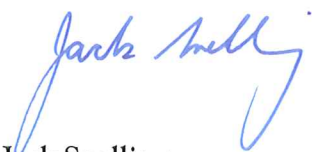
To be endorsed as a D.G.R., an organisation must fall within a general D.G.R. category as specified in the tax law and meet the other conditions relating to that category. D.G.R. status is currently accorded to a range of government entities.

The Government strongly believes that D.G.R. status should continue to be available to government entities consistent with existing arrangements.

Furthermore, a number of non-government entities which presently have D.G.R. endorsement would not meet the criteria of a charity under the proposed definition, and the consultation paper does not indicate whether these entities would retain their endorsement.

Thank you for receiving South Australia's response to the consultation paper "A Definition of after the close off date. I look forward to the exposure draft legislation.

Yours sincerely



Jack Snelling
Treasurer