



ACOSS Submission to the Exposure Draft *Charities Bill 2013*

About ACOSS

The Australian Council of Social Service is the peak body of the community services and welfare sector and the national voice for the needs of people affected by poverty and inequality. Our membership represents over 3000 organisations plus additional individuals through the combined network of the Councils of Social Service. ACOSS' vision is for a fair, inclusive and sustainable Australia where all individuals and communities can participate in and benefit from social and economic life.

We provide:

- Independent and informed policy development, advice, advocacy and representation about issues facing the community services sector;
- A voice for all people in Australia affected by poverty and inequality; and
- A key coordinating and leadership role for non-profit social services across the country.

We work with our members, clients and service users, the not-for-profit sector, government departments and other relevant agencies on current, emerging and ongoing social, systemic and operational issues.

This submission is based on ACOSS' analysis of the Exposure Draft *Charities Bill 2013* (the Bill). ACOSS has consistently advocated the positions contained within this submission over many years starting from our work with our members on the 2001 Charities Definition Inquiry (CDI), through the 2010 Productivity Commission Study into the Contribution of the Not-For-Profit Sector (2010) and up to the most recent processes, including the Not-For-Profit Sector Tax Concession Working Group Discussion Paper (2012), the Treasury Australian Charities and Not-For-Profit Commission Exposure Draft and Governance Arrangements Consultation Paper (2012), and the Treasury Consultation Paper 'A Definition of Charity' (2011).

Recommendations

- i. The 'advancement of citizenship or community development including volunteering, the voluntary sector, or the effectiveness and efficiency of charities' through the work of peak bodies should be specifically included as a charitable purpose in s.11 as per previous recommendations made by ACOSS, the University of Melbourne Not-For-Profit Project and PILCHconnect.



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- ii. Clarification and clear guidance should be provided as to what kinds of political engagement will be considered to be a disqualifying purpose, ideally through a clear reproduction of the current law as it is expressed within TR2011/T4.
- iii. Deductible Gift Recipient (DGR) status should be extended to those charities whose purpose is altruistic and for the public benefit as recommended in the ACOSS 2013-14 Budget Priority Statement.
- iv. Relieving poverty, illness and the needs of the aged should be included as specific charitable purposes in s.11.
- v. Provision of not-for-profit community housing should be specifically included as a charitable purpose in s.11, as per the recommendation made by the Community Housing Federation of Australia.
- vi. Guidance should be provided on how the presumption of public benefit will be reversed and conversely how organisations not presumed to have purposes for the public benefit must prove their charitable status.
- vii. Public benefit ought to be assessed with reference to the human rights that Australia recognises and a clear statement should be included that the public benefit test will only be failed where the detriment or harm occasioned by any charitable purpose is so serious that it far outweighs the public benefit.

ACOSS and the not-for-profit reform agenda

ACOSS has a keen interest in not-for-profit regulatory reform. We strongly endorsed the 2001 Charities Definition Inquiry (CDI) recommendations, which were developed in full and detailed consultation with the sector and attracted widespread support. The most important recommendation from the 2001 Inquiry was not the statutory definition of charity itself; it was the proposed reform of Public Benevolent Institution (PBI) status as that subset of charities whose main purpose was to assist the most disadvantaged in the community, regardless of whether this was via direct service provision. From a taxation standpoint, PBI status is much more important than charitable status alone, as it includes gift deductibility. Ironically, although this was first established with 'traditional charities' in mind, the scope of gift deductibility in the community and social services sector has lagged behind developments elsewhere, such as environmental organisations.



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In addition, there has been considerable concern across our network that the definition of should charity recognise advocacy activities as separate and distinct from direct services and as an important and legitimate activity under modern notions of charitable purpose.

Since the 2001 Inquiry there has been strong support for reform of the definition of charity along these lines: as both a vehicle to ensure that modern notions of charity were reflected in the understanding of what constituted charitable purpose **and** that society's support for those purposes was reflected in the availability of charitable tax concessions.

The Government's 2011 commitment and current action towards a statutory definition of charity are important and welcome steps. Unfortunately, separating the reform to the definition of charity from the process of reform to the sector tax arrangements undermines the opportunity of modernising the definition and the way those modern charitable purposes are publicly supported.

We turn now to the detail of the Bill.

Draft Charities Bill 2013

Our comments on the Bill focus on:

- I. The extent to which the Bill enshrines the current common law, including whether it adds any elements not present in the common law; and
- II. The structure of charitable purpose in the Bill.

I. The extent to which the Bill enshrines the current common law

In recognition that the use of both 'dominant' and 'primary' to define purpose were creating confusion in this reform, the Bill now only refers to purposes, requiring that all purposes be charitable unless they are ancillary or incidental. In addition, the Bill doesn't discuss activities at all, intending that all purposes of a charity are either charitable, or ancillary to that charitable purpose. Notwithstanding that the distinction between a charitable purpose and an ancillary purpose seems arbitrary, the intention within the draft Bill is clear.



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What is unclear is how that impacts upon related reforms. A key example here is the 'better targeting of tax concessions' process, a reform which focuses on *activities* undertaken by charities and how these sit beneath the charitable purpose. ACOSS reiterates our view that all activities of a charitable purpose ought to attract charitable tax concessions. Some charities may engage in non-charitable activities, and for those they should not receive the benefit of charitable tax concessions. However, where activities are being carried out within the accepted terms of charitable purpose, they ought to be able to access the tax concessions that show society's support for those activities. This applies to the full range of charitable purpose, across relieving illness, relieving the needs of the aged, advancing education, relieving poverty and advancing religion.

Whether the Bill adds any elements not present in the common law

The Bill sets out in s.11 that 'the purpose of promoting or opposing a change to any matter established by law, policy or practice in the Commonwealth' is a legitimate charitable purpose in its own right. This is a welcome clarification and acknowledgement of the contemporary understanding of the definition since *Aid/Watch*. Nevertheless, we remain committed to the views that we have consistently outlined, including in our submission to the 2010 Treasury Consultation Paper 'A Definition of Charity', that the clarity of the legislation would be improved by the express inclusion of the charitable purposes of peak bodies. While we acknowledge the reference to peak bodies in the explanatory materials, we do not think this is sufficient for an area so hotly contested in the past.

In addition, the 'political purpose' disqualifying purpose creates a much clearer, and therefore stricter, set of requirements to maintain charitable purpose than those currently contained within the common law and taxation laws. According to legal advice obtained by ACOSS, the charitable purpose outlined in s.11 captures the activities related to 'generating public debate' referred to in *Aid/Watch*, namely conducting research, publishing reports and media releases and holding events designed to influence the delivery of programs and services, insofar as the change that is promoted or opposed relates to the other charitable purposes listed in s.11. However, the 'political purpose' disqualifying purpose places real limits on the extent to which organisations can become involved in political activity. This is because it seems to remove the ability to engage in



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the activities outlined in TR 2011/T4, which sanctions persuading 'members of the public to vote for or against particular candidates or parties in an election, or distributing material designed to underpin a party political campaign,' without creating a risk in relation to the organisation's charitable status. The EM states that charities can't engage in partisan political activity 'where this can be construed as a purpose' (at para 1.80). It then goes on to say that this doesn't exclude debate, advocacy, lobbying or publishing comparisons of party policies. But activities such as the creation and distribution of How to Vote Cards, or 'score cards' on political parties' engagement with key social issues relevant to charitable purposes, is not addressed anywhere.

ACOSS reiterates its position that the focus of a definition of charity should be on the purpose of an organisation, not the activities undertaken in furtherance of that purpose. That is, once a charity has established its charitable purpose, it should be allowed to engage in all legal activities pursuant to it. Thus, while a political purpose may not be charitable, a charity should be able to engage in analysis of political discussion with clear boundaries around what is and is not regarded as partisan political activity.

Recommendations

- i. *The 'advancement of citizenship or community development including volunteering, the voluntary sector, or the effectiveness and efficiency of charities' through the work of peak bodies should be specifically included as a charitable purpose in s.11 as per previous recommendations made by ACOSS, the University of Melbourne Not-For-Profit Project and PILCHconnect.*
- ii. *Clarification and clear guidance should be provided as to what kinds of political engagement will be considered to be a disqualifying purpose, ideally through a clear reproduction of the current law as it is expressed within TR2011/T4.*



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II. The structure of charitable purpose in the Bill

In order to access tax concessions, an entity must first be registered as a charity pursuant to the *Australian Charities and Not-for-profit Commission Act*. Therefore, if an organisation does not qualify as a charity under the definition outlined in the Bill it will not be able to access charitable tax concessions. In addition, there are further requirements for endorsement to access some tax concessions. For example in order to achieve PBI status, it continues to be necessary that the organisation provide 'direct relief'. The introduction of a statutory definition of charity will not alter the need for such additional requirements to be met.

For many in our network the most important element here is the impact and interaction of a statutory definition of charity with existing tax concessions and with the likelihood of reformed tax concessions given the separate but parallel process of the NFP Sector Tax Working Group. Unfortunately, the sequencing of these reforms has left us with very limited capacity to understand these implications and to make useful policy recommendations about them.

ACOSS has always supported the maintenance of the presumption of public benefit for some charitable purposes within the statutory definition, particularly for those relevant to the work of the majority of the ACOSS membership. We continue to support the Bill's maintenance of the presumption of public benefit for the purposes of:

- Relieving illness
- Relieving the needs of the aged
- Advancing education
- Relieving poverty
- Advancing religion.

However, we note the potential for unnecessary confusion arising from the fact that only two of the purposes attracting the presumption – advancing education and advancing religion – are specifically included in the definition of charitable purpose at s.11. In the interests of clarity and consistency, we recommend that all of the purposes of presumed public benefit be expressly stated in s.11.



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In addition, while the explanatory materials state that the provision of accommodation to individuals 'with special needs or who are otherwise in special disadvantage in terms of their access to housing' is included within the purpose of advancing social and community welfare, ACOSS has argued elsewhere that the provision of not-for-profit community housing should also be specifically defined as a charitable purpose within the Bill at s.11. We maintain this position and support the submission of the Community Housing Federation of Australia that the original language of the CDI, as opposed to the language currently used in the explanatory materials, be used as the basis for a statement of definition of the provision of housing as a charitable purpose.

ACOSS is also concerned that the guidance provided on the rebuttal of the presumption of public benefit leaves uncertainty about how and when such rebuttal would occur; the necessary level of evidence; and how an entity that does not fall within the presumption proves public benefit. Furthermore, once the presumption of public benefit is displaced a question arises as to how harm and detriment will be assessed. On this point, we remain concerned about the lack of resolution to issues raised in previous submissions, namely that unless the consideration of harm or detriment is qualified, its application risks politicising decision making about the balance of harm and benefit of controversial activities. Within our network these might include safe sex education, needle exchanges and drug and alcohol services. If the consideration is to remain, it needs to be made clear that the public benefit test will only be failed if the detriment caused by a charitable purpose is so serious that it far outweighs the public benefit. Another issue that arises is whether the ACNC will be required to adopt the same principles that are used in the common law to reverse the presumption or whether a separate body of practice will emerge. Many of these issues could be resolved by greater detail in the explanatory materials.

Finally, confusion also arises from subsection 6(1)(b), which requires that a charitable purpose must be 'a universal or common good.' This phrase is not a feature of the common law and is not adequately addressed in the explanatory materials, which state at paragraph 1.47 'the description of the benefit as a universal or common good broadly expresses the character of purposes identified as charitable under the common law.' However, we do note that in determining whether a purpose is for the public benefit, regard must be had to relevant international human rights instruments.



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Recommendations

- III. *Deductible Gift Recipient (DGR) status should be extended to those charities whose purpose is altruistic and for the public benefit as recommended in the 2001 CDI and the ACOSS 2013-14 Budget Priority Statement.*
- IV. *Relieving poverty, illness and the needs of the aged should be included as specific charitable purposes in s.11.*
- V. *Provision of not-for-profit community housing should be specifically included as a charitable purpose in s.11, as per the recommendation made by the Community Housing Federation of Australia.*
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- VII. *Public benefit ought to be assessed with reference to the human rights that Australia recognises and a clear statement should be included that the public benefit test will only be failed where the detriment or harm occasioned by any charitable purpose is so serious that it far outweighs the public benefit.*