
Response to the Consultation Paper on a Definition of Charity

Prepared by BoysTown



BoysTown

Fresh start.
New hope.

Authorised By:

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Introduction

BoysTown is generally in support of the proposed provisions concerning the definition of Australian charities outlined in this Consultation Paper. It is in the interest of legitimate Australian charities to have a robust legislative definition concerning the purpose and scope of charitable operations. It is also critical that legislation promotes transparency and community accountability for the governance of charities. In relation to both these considerations it is our view that the legislative enactment of these proposed will support the achievement of these social policy objectives.

BoysTown has been an active participant in the Not for Profit reform process. We have provided submissions in response to two earlier Consultation Papers dealing with the formation of a National Not for Profit Regulator and the Targeting of Tax Concessions for Not for Profit organisations. Consistent with our earlier submissions it remains our view that it will be critical for Not for Profit organisations delivering social and community welfare services to be presented with a finalised package of proposed reforms and to be given an opportunity to provide feedback to the Commonwealth Government on their implications and implementation requirements if this reform process is to be effective and to be based on true partnership. For example, some of our feedback in relation to the Consultation Paper on the Better Targeting of Tax Concessions stated that it could not be fairly determined as to what a related and non-related business activity is for a charity unless there was in place a consistent legal definition as to what constitutes a charity. Consequently this consultation on the purpose of charitable organisations should have predated the debate concerning the taxation of charities. This issue highlights the risk that unless there is an opportunity to review these reforms as a whole then a piecemeal approach will be taken to their implementation which may unintentionally impact on the operations of organisations delivering services to the most disadvantaged people in our community. Consequently BoysTown recommends that the Commonwealth Government at the time of releasing the exposure draft for the proposed Charities Bill also release a White Paper on all other proposed legislative and taxation changes in respect to charities so that the sector will be in a position to provide informed comment on the suite of changes being proposed by Government to reform the sector.

Recommendations:

- 1.** That the Commonwealth Government at the time of releasing the exposure draft for the proposed Charities Bill also release a White Paper on all other proposed legislative and taxation changes in respect to charities so that the sector will be in a position to provide informed comment on the total reform strategy for Not for Profit and Charitable organisations.
- 2.** That the Australian Charities and Not for Profit Commission once fully operative, work in partnership with the Not for Profit sector to develop and implement the public benefit test procedure.
- 3.** That urgent action be taken through the Council of Australian Governments to harmonise national fundraising legislation and regulation once cross-jurisdictional agreement is reached on the legal definition of charities.

About BoysTown

BoysTown is a national organisation and registered charity which specialises in helping disadvantaged young people and families who are at risk of social exclusion. Established in 1961, BoysTown's mission *is to enable young people, especially those who are marginalised and without voice, to improve their quality of life*. BoysTown believes that all young people in Australia should be able to lead hope-filled lives, and have the capacity to participate fully in the society in which they live.

BoysTown currently provides a range of services to young people and families seeking one-off and more intensive support including:

- Kids Helpline, a national 24/7 telephone and on-line counselling and support service for five to 25 year olds with special capacity for young people with mental health issues;
- Accommodation responses to homeless families and women and children seeking refuge from Domestic/Family Violence;
- Parenting programs offering case work, individual and group work support and child development programs for young parents and their children;
- Parentline, a telephone counselling service for parents and carers in Queensland and the Northern Territory;
- Paid employment to more than 400 young people each year in supported social enterprises to assist their transition to mainstream work;
- Training and employment programs that skill approximately 6,000 young people each year, allowing them to re-engage with education and/or employment, and
- Response to the needs of the peoples of the remote Indigenous communities of the Tjurabalan in Western Australia

BoysTown is constituted as a Public Company Limited by Guarantee. Our organisation has its own independent income derived from an active and national fundraising program including the BoysTown Art Union, corporate sponsorships, work-place giving programs, donations and bequests. More than 60% of BoysTown's income is derived from this fundraising program with the remainder being comprised of Commonwealth and State grants and fee for service activities. We place great importance on our independent fundraising capability as it allows the organisation to deliver high impact services by supplementing Government funding as well as initiating innovative services in response to the needs of young people and their families in areas where Government funding has been traditionally limited. Such services include BoysTown's Domestic Violence Program and the national telephone and online counselling services for children and young people (Kids Helpline).

Issues in Defining Charity

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 exclusive charitable purpose?*

BoysTown supports this amendment on the basis that all activities undertaken by charities should be supportive of its charitable purpose outlined for incorporated bodies in its constitution.

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?*

The principle underpinning this decision, namely that the Peak organisation's level of integration and commonality of purpose with its organisational membership determines its charitable status is supported by BoysTown. Peak organisations such as Catholic Social Services Australia are critical to the work of both Government and Not for Profit organisations in providing real time information regarding trends in service delivery and other research to inform the development and implementation of social policy. Consequently Peak organisations generally undertake a key advocacy role which should be positively recognised when considering their charitable status.

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

The sections of the Consultation Paper relating to this question once again raises the issues associated with charitable purpose and the level at which charitable organisations can deliver services consistent with purpose. For example, an organisation's charitable purpose may relate to a significant section of the population but due to a limited funding base it may only be able to provide services to a small number of clients in the target group. Consequently in determining public benefit a greater emphasis should be placed on assessing the potential public benefit of the charitable purpose rather than the actual numbers of people directly receiving benefit from the service which may be limited due to funding considerations. There are so many possible scenarios in relation to this matter that we believe that the Australian Charities and Not for Profit Commission should be allocated the responsibility and power to individually assess this issue when registering individual organisations as charitable, where the actual number of clients receiving benefit from the service is limited. The transparency of this process would be enhanced by the Commission developing a framework in partnership with the Not for Profit and Charitable sector in relation to the determination of public benefit.

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?*

This issue requires extensive consultation with Aboriginal organisations and communities. Subsequently BoysTown prefers not to respond at this stage until the wishes of Aboriginal and Torres Strait Islander people are known.

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?*

BoysTown supports the principles outlined in TR 2011/D2 and believes that this ruling provides a useful base for the development of a statutory definition of public benefit for inclusion into legislation. However in the implementation of this legislation it is our view that the Australian Charities and Not for Profit Commission should take the lead role in the development of the public benefit test framework in partnership with the Not for Profit and Charitable sector. The development of this framework needs to emerge from extensive consultation with the Not for Profit sector. Furthermore it is our view that the public benefit test should not just be applied at the registration stage for a charity. It is our view

that the public benefit test should be regularly applied every 2-3 years to all registered charities to ensure that these organisations continue to operate consistently with the community's interest. This will promote public trust in the charitable sector.

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?*

As stated in relation to Question 5 it would be our view that there should be both a statutory definition of public benefit grounded in the principles outlined in ruling TR 2011/D2 and incorporated into legislation, together with an administrative framework implemented by the Australian Charities and Not for Profit Commission. Any changes linked to the evolution of common law would inform the progressive and ongoing application of both the legislation and the administrative frameworks in relation to the public benefit test.

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?*

As stated, BoysTown supports the view that charities need to demonstrate that their purposes and operations are of public benefit. Although it is recognised that there may be some initial cost in meeting this test, this expense is justified in terms of increased public confidence and trust in the Charity and Not for Profit sector. The only caveat on this support is that the administrative procedure for the implementation of the public benefit test needs to be developed in partnership with the Not for Profit and Charity sector. As previously noted the application of a public benefit test should be ongoing and applied every 2-3 years to promote continuing public confidence in the sector.

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?*

The ACNC needs to provide clear criteria, guidelines, tools and training in relation to the implementation of the public benefit test. The ACNC could also promote the value of the accreditation system within the community as a way of increasing public confidence in charities. Accredited charities could be listed on the ACNC website to inform the public as to the legitimacy of organisations.

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

No response.

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?*

BoysTown supports the principle based on the High Court ruling in the *Word Investment* decision that activities undertaken by a charitable entity need not always be intrinsically charitable for the institution as a whole to be classed as charitable. Charities are operating in a hostile operational environment marked by rising costs. The introduction of the carbon tax and the likely outcome from the current action in the Fair Work Australia Commission which will see significant

increases in the salaries of staff employed by charities demonstrate this claim. Not for Profit organisations are not fully funded by Government. The Productivity Commission Inquiry into the Not for Profit Sector found that overall, Government funding contributed only one third of the funding of economically significant organisations in the sector. For Not for Profits delivering health, education and social services Government direct funding support accounted for about half of these organisations' incomes. Furthermore, philanthropic gifts such as donations, bequests and legacies only make up about 10% of income¹. Consequently to meet rising costs in service delivery and to be sustainable, Not for Profits are required to develop diversified income streams that may occasionally involve activities of a more commercial nature. Consequently BoysTown believes that the definition of a charity needs to include recognition that while not all activities will be charitable all activities undertaken needs to be in furtherance of the entity's charitable purpose.

12. Are there any issues with the suggested changes to the Charities Bill as outlined above to allow charities to engage in political activities?

BoysTown supports the suggested amendments to the Charities Bill 2003 as outlined in Section 108-09. We are encouraged that the Treasury Department recognises that advocacy focused on changing Government policy or the Law is a legitimate activity of Charities in striving to achieve their purpose.

13. Are there any issues with prohibiting charities from advocating a political party, or supporting or opposing a candidate for political office?

Similarly BoysTown supports the suggested amendments to the Charities Bill 2003 outlined in Section 112 that would prohibit party political activities.

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?

BoysTown does not wish to provide a response to either of these questions

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?

BoysTown is supportive of the list of charitable purposes listed in the fore mentioned pieces of legislation. The concern that in the future there may be emerging issues that quite legitimately should be seen as charity purposes but be outside the scope of legislation could be dealt with by providing the Australian Charities and Not for Profit Commission with administrative discretion to adjudicate on these matters. The Commission could be provided with the regulatory power to accept a new charity purpose as part of the registration process if it believed that the purpose was beneficial to the community.

¹ Productivity Commission, 2009, *Contribution of the Not-for-Profit Sector*, Draft Research Report, Canberra. Section 7.1-2

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

BoysTown strongly supports the need for the harmonisation of fundraising legislation and for any nationally consistent legislation to be administered through the Australian Charities and Not for Profit Commission. The BoysTown Art Union is the major source of funding for our services. To operate this Art Union and other fundraising activities BoysTown needs to comply with different State based legislation and regulations relating to Art Unions and fundraising. There are inconsistencies between each State in relation to their respective legislation requirements as well as differences between legislation relating to Art Unions and fundraising within singular State jurisdictions. Reporting and compliance standards also vary and are contradictory between States. Registration of Not for Profit organisations with the Australian Charities and Not for Profit Commission should be sufficient accreditation to operate fundraising activities across States without the need for individual registrations in each State as is currently required.

Furthermore, current Commonwealth and State based legislation does not provide a consistent framework for online fundraising. There is a multiplicity of inconsistent and overlapping legislation governing this activity. For example BoysTown operates and advertises its on-line fundraising in compliance with:

- The Queensland Government's Charitable and Non-Profit Gaming Act 1999 (Category 3); Charitable and Non-Profit Gaming Regulation 1999; Collections Act 1966; Charitable Funds Act 1958; Collections Regulation 2008;
- The Victorian Government's Gambling Regulation Act 2003 and the Gambling Regulation Regulations 2005; The Fundraising Act 1998; Fundraising Regulations 2009;
- The New South Wales Lotteries and Art Unions Act 1901; NSW Lotteries and Art Unions Regulation 2007; Charitable Fundraising Act 1991 No 69; Charitable Fundraising Regulations 2008;
- The WA Charitable Collections Act (1946); Charitable Collections Regulations 1947;
- SA Collections for Charitable Purposes Act 1939;
- The Australian Capital Territory Lotteries Act 1964 ;
- The Federal Government's Interactive Gambling Act 2001; Interactive Gambling Regulations 2001;
- The Federal Government's Trade Practices Act 1974;
- The Federal Government's SPAM Act 2003;
- The Federal Government's Privacy Act 1988;
- Multi-jurisdictional Responsible Play Guidelines;
- The Fundraising Institute of Australia's "Standard of Electronic Practice" 2008;
- The Australian Direct Marketing Association's "Code of Practice" in particular its Ecommerce Standards;
- The Australian Association of National Advertising "Code of Ethics"

The administrative costs and activities required to manage this inconsistent and duplicative regulatory framework reduces the level of funds for services and reduces organisational efficiency.

Consequently we urge that action be expedited through the Council of Australian Governments to seek agreement on this legislative framework for the definition of charities and then to immediately commence work on harmonising fundraising legislation. As stated this is an urgent priority for charitable organisations that

operate nationally.

The following legislative, policy and evaluation frameworks will also need to be harmonised to support National legislation on the definition of charities:

- a) Commonwealth and State Incorporation Acts
- b) Fundraising legislation – see discussion above
- c) Financial Reporting Standards
- d) Contractual reporting standards across Commonwealth and State funding bodies. It should be noted that these standards may vary between Departments within the same jurisdiction
- e) Standards relating to governance and service delivery. State Governments are introducing standards which organisations are required to meet to be eligible for funding. For example NFPs in Queensland need to be compliant with the Standards for Community Services. Unless these types of standards are harmonised across Australia there is a risk that the introduction of the Australian Charities and Not for Profit Commission may lead to the introduction of another set of new and/or contradictory standards in relation to governance and service delivery.
- f) A common framework for measuring the impact and contribution of NFPs to the Australian community. The Productivity Commission found that there was no common measurement system for assessing the impact of NFP services and activities. If the Australian Charities and Not for Profit Commission and the Australian community are to measure the public benefit of NFPs across diverse sectors a common measurement framework is essential.

As stated unless these fundamental and systemic reforms are undertaken the objectives for the new Australian Charities and Not for Profit Commission will not be achieved and furthermore duplicative reporting requirements for Not for Profit organisations will most likely be increased.

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

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

No response

Conclusion

BoysTown is supportive of the proposed changes outlined in this Consultation Paper. It is particularly encouraging that the Not for Profit and Charity sector's advocacy work is acknowledged as being a core function. As previously stated it is our strong view that all currently proposed legislative and taxation changes associated with the Not for Profit reform process needs to be consolidated into a White Paper to allow organisations an opportunity to consider these reforms in total.