

Catholic Health Australia

**A definition of Charity:
Response to Treasury Consultation**

December 2011

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About Catholic Health Australia

21 public hospitals, 54 private hospitals, and 550 aged care facilities are operated by different bodies of the Catholic Church within Australia. These health and aged care services are operated in fulfilment of the mission of the Church to provide care and healing to all those who seek it. Catholic Health Australia is the member organisation of these health and aged care services. Further detail on Catholic Health Australia can be obtained at www.cha.org.au.

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Summary

The Catholic Health Australia (CHA) network of public hospitals, private hospitals, residential aged care services, community aged care services, and home nursing services do not oppose the codification of the current common law definition of charity. We do however question why codification is required, being of the view that current arrangements sufficiently facilitate the smooth delivery of health and aged care services and the move to codification risks unintentionally disturbing the smooth delivery of those services.

The Treasury discussion paper proposes that codification of charity provide a definition that:

- requires an entity to be a not-for-profit;
- for its dominant purpose to be charitable;
- for it to be of public benefit;
- for it not to engage in activities that do not further, or are not in aid of, its dominant purpose;
- that it not have a disqualifying purpose;
- that it not engage in conduct that constitutes a serious offence;
- and that it not be an individual, partnership, a political party, a superannuation fund or a government body.

The CHA network of hospitals and aged care services would not be adversely impacted by the codification of law that reflected these seven elements. However, the way in which three of these elements could be codified gives rise to the potential of unintended consequences. Specifically, provision in a future law would need to be made to:

- Recognise charities often do and should be encouraged to have multiple purposes, with only the dominant purpose being relevant to determining if the entity is properly designated as a charity;
- Retain the current common law and *Taxation Ruling 2011/4* precedents that enable a presumption of public benefit; and
- Retain the current common law approach to the exclusion of ‘government bodies’ from being defined as charitable.

These three matters are discussed in some detail in the body of this submission. CHA’s support for the codification of the current definition of charity is dependent on a future law satisfactorily addressing these three elements and:

- The Council of Australian Governments agreeing that all States and Territories will adopt a common codified definition of charity prior to it coming into effect, such that there be national legal consistency; and that
- An undertaking be given by the Australian Government to ensure that reporting and compliance with the proposed definition create no unreasonable administrative or cost burden on charitable organisations.

In providing this submission, we endorse the submission of the Australian Catholic Bishops Conference, a submission that CHA has contributed to in part.

Multiple Purposes

The CHA network of hospitals and aged care services generally derive their charitable status under two headings simultaneously. The first heading is that of the advancement of religion, as all CHA network hospitals and aged care services are first and foremost established as part of the healing ministry of the Catholic Church. Each particular hospital or aged care service also claims charitable status under the heading of *“other purposes beneficial to the community:”*

- Hospitals claim their status for their purpose of *“supporting the relief of sickness;”* and
- Aged care and disability services derive their status for their purpose of *“meeting a community need.”*

We note that paragraph 51 of the Treasury discussion paper does not propose to limit the number of purposes a charity may have. This capacity for any future law to also continue to recognise the multiple purposes of charities is

particularly important to the CHA network of hospitals and aged care services who have dominant purposes of advancing religion and “supporting the relief of sickness” and “meeting a community need.”

In fulfilling these dominant purposes, a range of other enterprises are also conducted in support of achieving the dominant purpose. Other enterprises might include the operation of a car park as part of the broader operation of a hospital, or the renting of premises within an aged care facility to small business operators who conduct newsagencies or cafes for the benefit of aged care service consumers. The operating of car parks, cafes, and newsagents is clearly not the dominant purpose of either a hospital or aged care service, but they can often operate as large ‘going concerns.’ Their presence, and that of other commercial activities, need not negate charitable status in circumstances where the dominant purpose remains “supporting the relief of sickness” or “meeting a community need.”

Any narrowing of the current practice of assessing a dominant purpose to affirm an entities charitable status may require some entities within the CHA network of hospitals and aged care services to revise their founding company statutes, company constitutions, governance structures and operating arrangements in order to retain charitable status under a future more restrictive law. We do not, from the discussion paper, see that such an outcome is either likely or intended and simply warn against this unintended consequence occurring.

Presumption of Public Benefit

At various points the Treasury discussion paper raises the prospect of restricting, limiting, or ending the current common practice of enabling charities to recover the cost of providing some services by way of levying of fees or charges. The Discussion Paper raises the possibility of restricting, limiting, or ending cost recovery at paragraphs:

- 75, where reference is made to Scottish, Ireland, and Northern Ireland’s practice of

assessing if the levying of a fee or charge by a charity is considered so burdensome so as to restrict parts of the public from being a beneficiary of a charity and therefore negating the public benefit to the extent that the entity is no longer deemed a charity;

- 86, where reference is made to the Charity Commission of England and Wales having issued a directive requiring a charity to demonstrate how those who are unable to pay a fee charged by a charity are otherwise able to benefit from its aims in order for the entity to demonstrate its public benefit such that it remains deemed a charity;
- 8.2(b) on page 30 where it is stated that listing on the Scottish Charity Register requires fees charged by charities not to be “unduly restrictive,” and where this same requirement of the Northern Ireland charitable definition is referred to on page 37 at paragraph 3.3(b).

In each of these instances drawn from the United Kingdom and Ireland, the presumption of public benefit has been removed from the definition of charity. The removal of the centuries old presumption of public benefit in these countries has given rise to an uncertain application of the law, where charities are being forced to have courts work out just what lawmakers meant by the operation of public benefit where cost recovery for services occurs. The *Independent Schools Council v The Charity Commission of England and Wales* [2011] UKUT 421 (TCC) is one of what will likely be many English cases that will seek to ascertain the operation of public benefit where cost recovery for service delivery by a charity occurs. This period of legal uncertainty is causing disruption in service planning by charities in England, and is already causing concern among charities in Australia who depend on cost recovery for service delivery.

In Australia, the CHA network of hospitals and aged care services levy fees and charges where appropriate in order to fund the cost of service delivery. Private hospitals recover their costs

mostly through reimbursement by private health funds for a patient's hospital care. Public hospitals charge user fees where State or Territory Government's sanction or require a user contribution. Aged Care services charge accommodation or care fees in compliance with the *Aged Care Act (1997)* Cth. In each case, the presence of user fee does not negate the presumption of a public benefit.

We argue an Australian definition of charity should retain the presumption of public benefit. Retaining the presumption of public benefit would avoid the almost impossible task of having to define in legislation exactly what service and charge could be subject to cost recovery, and those services and charges that could not.

We argue the Australian definition of charity need not impose an “*unduly restrictive*” test in considering if a charity is of public benefit where it recovers its costs through fees, charges, levies, or memberships. We make this argument for the following reasons:

A) The principle of appropriate and reasonable cost recovery is good public policy:

The CHA network of hospitals and aged care services recover some of their operating costs by way of fees and charges, as do other charitable health services, aged care services, welfare services, schools, universities, colleges, and an array of other social and human service entities. These entities are performing a public good, and deliver services that government would most likely have to deliver if cost recovery practices were restricted, limited, or ended.

Costs recovered from those who utilize services are levied on grounds of the capacity of the individual to pay: a ‘Meals on Wheels’ fee is modest according to the usually limited means of the care recipient. It is a common practice that many within the CHA network of hospitals and aged care services make allowance for service access for those not able to contribute to the service cost at all.

In recovering costs, no profit or shareholder dividend is paid to any third party. Rather, all funds derived from cost recovery are applied to service delivery and any surpluses are directed to service upgrade or expansion. These elements of the principle of cost recovery are good public policy.

B) Current public policy allows charities to recover costs of service delivery

Paragraph 144 of *Taxation Ruling 2011/4: Income Tax and Fringe Benefits Tax: Charities* states that ‘*the charging of fees to members of the public for goods, services or other benefits that are provided for a purpose that is otherwise charitable is unlikely, on its own, to prevent the purpose being charitable*’. Given that the Ruling affirms that recovery of costs is not contrary to the presence of public benefit, the proposed law in seeking to simply codify the current approach should seek to continue the precedent detailed in the Ruling.

Taxation Ruling 2011/4 states further that the benefit of a charitable purpose does not have to be for everyone in a community to satisfy the requirement that it be public. Even where benefits are restricted to certain parts of the community only (for example by the charging of fees) then so long as benefits are available to an appreciable portion of the community the public benefit test will be satisfied. The notion of what is for the public benefit is not limited to a closed list at present, and nor should it be as a consequence of the proposed new law.

C) A large but unquantified number of charities would be impacted

It is not known how many charities in Australia currently derive operating revenue from cost recovery for their services through the levying of fees and charges.

The Productivity Commission¹ did not assess how many charities actually levied fees and charges, but the Commission did state “*most rely on private contributions such as fees and charges.*” The Commission found for culture and

recreation not-for-profits, fees represented three quarters of total operating revenue.

An ACOSS surveyⁱⁱ cited in the Commission report found \$150 million, or nine percent, of total operating revenue of community service organisations (comprising welfare, community care, aged care, child care, and employment training) was derived in 2008 from client fees.

Whilst it is not possible to quantify the full extent to which charities currently provide services by way of cost recovery, the evidence provided by the Productivity Commission, which we argue underestimates the extent to which cost recovery occurs by charities, at least indicates that removing access to this form of operating revenue would adversely impact a large portion of charitable service delivery across the nation, and in turn, the clients that these charities serve.

D) There is no substantiated detriment of current arrangements

The Treasury discussion paper does not outline any current detriment arising from existing arrangements that allow charities to recover their costs. In order to establish why current arrangements should be disrupted by the restricting, limitation, or ending of cost recovery, a strong case would need to be made to those charities that utilise the practice as part of their operating revenues. Those charities would need to endorse the case for change. No such case has been made in the Treasury discussion paper.

E) Applying an “unduly restrictive” test would be difficult to administer

The English application of the requirement to test if a cost recovery charge negates public benefit has proven itself complicated to administer.

The *Independent Schools Council v The Charity Commission of England and Wales* case is the first key ruling that, if applied in Australia, would disrupt educational service delivery. The need for this test to be litigated underscores the difficulty of overturning several centuries of the

presumption of public benefit and replacing it with a subjective formula.

We argue the significant and protracted effort that would be required by government and charities to define a public benefit test to suit the needs of all legitimate Australian charities would distract from service delivery. We argue further that creating a workable legislative definition to operate across the entire charitable community might prove impossible, and would probably lead to several years of costly and inefficient definition by the courts (which is appearing to be the English experience).

On balance, we do not see that the return on investment arising from the likely effort to create a test is warranted.

F) Restricting charities from recovering their costs would result in service cuts, leading to new costs for governments

No CHA network hospitals or aged care services are solely dependent on cost recovery to fund their services. Most derive revenues from multiple sources. Specific services of charities that are funded by way of cost recovery would, however, be at risk of being scaled back or ceased if the fees or charges that fund them were restricted or ended.

The types of services that might be at risk would be counseling services to people with mental health challenges, home nursing visits to older Australians otherwise unable to care for themselves, and accommodation services to people with disabilities among others. If these or other services had to be wound back or ceased, demand for the services would continue. Government would be expected to step into the market to ensure smooth service delivery.

Such an intervention by government into the market would be costly, and not worth the risk in circumstances where the case for restricting or ceasing cost recovery by charities has not been made.

On behalf of government

The *Charities Bill 2003*, cited by the Treasury discussion paper as the foundation on which a future definition of charity would be based excludes 'government bodies' from the definition of 'charitable body'. The *Charities Bill* defined 'government bodies' as those including entities controlled by the Commonwealth, a State or Territory, or by a foreign government. No definition of 'control' was provided.

Applying the reasonable person test, the CHA network of public hospitals and aged care services would not likely be viewed as 'government bodies,' as they are not owned by government. However, these very same public hospitals and aged care services are subject to certain 'control' by Commonwealth, State, and Territory governments, raising the prospect of a court potentially finding that they may fall within the proposed exclusion of 'government bodies' proposed by the *Charities Bill*. For example:

- The CHA network of public hospitals in Victoria are subject to the provisions of the *Health Services Act (1988)* Vic which requires they operate subject to direction by the Secretary to the Department of Health; that they accept limits on powers to enter into contracts; and that they require approval to appoint a CEO.
- The CHA network of public hospitals in NSW are subject to the provisions of the *Health Services Act (1997)* NSW, which require by-laws of these hospitals to be made subject to the approval of the Minister for Health.
- The CHA network of aged care services, be they residential or community care providers, are subject to the provisions of the *Aged Care Act (1997)* Cth which requires providers to be approved and subject to operational standards, breach of which can result in service closure.

If the *Charities Bill* was adopted as currently drafted, immediate uncertainty would be triggered about if these entities would be excluded as charities as a consequence of the *Charities Bill's* exclusion of 'government bodies' from being charitable.

Some of the uncertainty about the charitable status of organisations delivering services on behalf of governments was addressed in *Central Bayside General Practice Association Limited formerly known as Central Bayside Division of General Practice Limited v Commissioner of State Revenue* [2006] HCA 43. Question 15 of the Treasury discussion paper asks if, following the decision of the High Court in the Central Bayside decision, the existing definition of 'government body' in the *Charities Bill* is adequate.

In *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* [2005] VSCA 168 the Victorian Court of Appeal decided the Central Bayside Division of General Practice was not a charitable body because it performed the work or functions of government and was a "creature or agent of government."

That decision was unanimously reversed by the High Court in *Central Bayside General Practice Association Limited formerly known as Central Bayside Division of General Practice Limited v Commissioner of State Revenue* [2006] HCA 43. Members of the Court made the following observations:

- there is authority to the effect that a hospital subject to the entire control of government officers is charitable;
- bodies established by statute to effect governmental purposes have sometimes been held capable of being treated as charitable;
- funds or property placed in the hands of a government or statutory authority may be subject to a charitable trust.

The discussion paper also raises the question of "whether purposes that have been found not to

be charitable should be listed as ‘disqualifying purposes’”. ‘Disqualifying purposes’ referred to in the Treasury discussion paper include ‘governmental’ purposes.

The Charities Bill did not specify ‘governmental purposes’ as a ‘disqualifying purpose’. However, the Treasury discussion paper refers to Draft Tax Ruling 2011/D2, which states that ‘governmental purposes’ have been found to not be charitable. That ruling has now been completed in terms relevantly the same as the draft ruling. We submit that the Australian Tax Office’s assertion that ‘governmental purposes’ are not charitable is a significant over-statement of the common law, and this view should not be reflected in the proposed law.

Should the Commonwealth adopt the proposed definition of charity outlined in the *Charities Bill* which excludes bodies controlled by government, or also adopt the position of Tax Ruling 2011/D2 that treats ‘governmental purposes’ as a ‘disqualifying purpose’, the Commonwealth will effectively be *changing* the common law definition of charity, not incorporating the ruling of the High Court in *Central Bayside*. The effect of this change could possibly exclude the CHA network of public hospitals and aged care services from being defined as charitable. Such an outcome would disrupt the delivery of health and aged care services across the nation.

We submit that any definition of charity that excludes ‘government bodies’ or lists ‘government purposes’ as a ‘disqualifying purpose’ should be clear in its intent to limit actual government agencies from being considered as charitable. It should ensure that public hospitals and aged care services operated by non-government owners are not excluded as charities.

Ideally, a narrow definition of ‘government body’ that is limited to government departments is preferable to a definition that refers to ‘control’. The definition of ‘government entity’ under the *A New Tax System (Australian Business Number) Act (1999)* Cth – which makes no reference to control – might offer a preferable alternative.

ⁱ Productivity Commission, 2010, *Contribution of the Not-for-Profit Sector*, Research Report, Canberra.

ⁱⁱ Australian Council of Social Service, 2009, *Australian Community Sector Survey*, Sydney.