Submission on A Definition of Charity
Consultation Paper – October 2011

Interserve Australia welcomes the opportunity to respond to the Treasury's consultation paper on a statutory definition of charity.

About Interserve

Interserve Australia is the Australian arm of an international fellowship of Christian organisations that has its origins in an agency established by English women nearly 160 years ago to serve poor and disadvantaged women in the Indian sub-continent in the areas of health and education.

The geographic footprint expanded post World War II, however men and women serving in education, health and development, in partnership with national churches and different types of NGO's and working amongst the most needy people in the world has remained the primary focus. With Australia now home to people from such a wide range of cultures, Interserve Australia now also partners with churches and other agencies in Australia to serve cross cultural communities.

There are now approximately 800 Interserve personnel serving in Asia and the Arab world, of whom around 100 are Australians.

Interserve does not develop projects in its own right but seconds skilled and experienced personnel to work with other organisations established in foreign countries. Interserve Australia has responsibility for recruiting, preparing and supporting Australians.

Interserve Australia is an Incorporated Association in Victoria, a member of Missions Interlink Australia and a signatory to the Australian Council for International Development (ACFID) code. It operates an approved overseas aid fund.

Responses to 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 exclusively charitable purpose?

Any qualifier on the term 'charitable purposes' increases confusion in the definition. The issue with 'exclusively charitable' goes to the potential difficulty and controversy for the ACNC around deciding what it means. By contrast, if a qualifier is needed, there are many years of judicial interpretation on the meaning of 'dominant purpose' in the context of charities law.

It is important to make it clear that the focus is on purposes, not activities, with an objective test applied by the ACNC.

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 appreciate clarity around the charitable status of peak bodies and suggest that the wording of the NSW ADT decision be included in the definition. We understand that other courts are not necessarily bound to follow the NSW ADT decision and therefore it might not impact their decision, thereby increasing uncertainty for organisation of this nature.

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

We would have concerns around any definition that would impact smaller organisations or purposes that, for example, assist people in remote communities or people with rare diseases. In this regard, we note the Board of Taxation recommendation 6.25 that it should be clear that any determination of whether the number of people to whom a benefit may be provided is 'numerically negligible' should be determined by reference to the 'size of that part of the community to whom the purpose would be relevant'.

We further note that the concept of 'public' is difficult to define, whereas the concept of 'private' (i.e. what is not public) is easier to define more clearly and may provide greater clarity to organisations.

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?

[no comment]

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?

It is difficult to define what things are 'for the public benefit' as this is a constantly changing concept. In our view, it would be more appropriate to presume that a organisation with charitable purposes within one of the stated categories of charity is for the public benefit unless it is shown that it is for private benefit, or it harmful or detrimental to the public. The concept of private benefit is more static and therefore easier to define.

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?

We agree that greater flexibility is helpful in the determination of public benefit. The best way to obtain this flexibility is to continue to rely on the common law, including the continuation of the common law (rebuttable) presumption of public benefit in respect of stated categories of charity.

The approach taken by England and Wales in this regard is not appropriate in the Australian context. This guidance has been costly to develop and administer, has been found by the

Tribunal to be incorrect and over-reaching, and could not necessarily be easily adopted into the Australian context.

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?

Stated categories of charity, such as the first 3 Pemsel heads or any wider formulation, have been specifically stated on the basis that they are beneficial to the community and charitable and consequently there should be a presumption of public benefit for charities in relation to these categories (such as the advancement of education, advancement of religion and relief of poverty).

The concept of 'public benefit' is difficult and administratively costly to positively prove, especially in situations where the benefits provide are intangible or indirect in nature.

Any suggestion that the removal of the presumption will result in a decrease in administrative costs to the regulator and no substantial increase to the sector is flawed, as it must be recognised that if there is no longer a presumption of public benefit unless evidence is raised to the contrary, the regulator must presume that an organisation is not for the public benefit unless it can be positively established by evidence, and will therefore need to request, and evaluate, detailed information from all charities establishing 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?

ACNC resources, as part of its compliance function, would be best directed to gathering additional information where there is a perceived risk that an organisation does not meet charity requirements. ACNC responses need to be risk based and proportionate.

Consequently, the best way to appropriately use the ACNC resources is to presume public benefit for stated categories of charity, and direct the resources of the ACNC, not to investigating whether each and every applicant is for the public benefit, but to investigating in detail those organisations that appear to be for private benefit, or appear to have harmful or detrimental purposes or ways of achieving their purposes, and to educating the sector in relation to these factors.

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

Education and religion should be considered to be inherently for the public benefit, as they are under the Pemsel heads. It is particularly difficult in the case of charities for the advancement of education and charities for the advancement of religion to positively demonstrate public benefit as the benefits provided by organisations of this nature are often intangible, indirect and may also be future benefits rather than present benefits.

Further, the changing world views in society may have an adverse impact on charities of this nature and may limit their ability to show continuing public benefit in the future.

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

Under the current law, it is already well established that a charitable organisation must use their income and assets in furtherance of their charitable purpose, or in furtherance of a purpose that is incidental or ancillary to a charitable purpose. Any confusion in relation to this requirement seems to stem not from a shortcoming in the law but rather from the reluctance of the current regulator, or the Attorney's General of each State as the protectors of charities, to enforce this requirement.

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

The test should be about purposes which must not be confused with activities. It is not relevant to consider activities. Activities that are not inherently charitable become charitable when done for a charitable purpose and consequently consideration of the activities themselves confuses the determination of whether an organisation is charitable.

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?

Any charity should be able to engage in political activity to promote its charitable purpose however financial support should be excluded.

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

In a democracy, and in Australia, where voting is compulsory, charities should be able to advocate, support or oppose in this way.

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

The definition of charity to be enacted is intended to apply for all purposes of Commonwealth Law, and hopefully also State and Territory Laws. As a result, the definition should not be driven by tax policy considerations, but should be driven by broad characterisations of what constitutes charity. The definition of Charity should be broad and inclusive of all entity types, and any narrowing of the definition for tax policy reasons relating to the imposition of income tax should be done in taxing statutes rather than the charities definition.

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

Consistent with the Central Bayside decision, significant government funding, in regulated sectors of Australian industry and society, does not make an entity a government body.

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?

The list of charitable purposes is appropriate provided that the presumption of public benefit is retained.

17. If not, what other charitable purposes have strong public recognition as charitable which would improve clarity if listed?

The inclusion of amateur sporting groups would be appropriate. Note that England and Wales plus also Northern Ireland include it.

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

[no comment]

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

[no comment]

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

[no comment]

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