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Dear Sir/Madam

**Consultation Submission – A Statutory Definition of Charity
Exposure Draft – Charities Bill 2013
Exposure Draft - Charities (Consequential Amendments and Transitional Provisions) Bill 2013
Explanatory Memorandum (EM)**

Thank you for the opportunity to provide our views on the above Exposure Draft legislation. Our comments arise from our deep understanding and involvement with the not-for-profit (NFP) sector as well as our consultations therewith in respect to these Exposure Drafts.

1. About Moore Stephens

We are writing on behalf of the Moore Stephens Australia network of eight independent firms of business advisors and chartered accountants. Moore Stephens have a real understanding of the environment in which our clients operate. We currently service a diverse range of entities within the Sector and specialise in providing assurance, accounting, tax and advisory services to our NFP clients. We provide a national service offering to a number of key clients operating in the Not-for-Profit Sector, including the following:

- Religious organisations;
- Large Charities;
- Football clubs and sporting associations; and
- Schools, Colleges, Universities and many TAFE colleges in Australia.

We have had a long standing commitment and involvement for the past 50 years in this Sector. We have been active in recent years in providing submissions to the Government's various committees and consultations to support the Sector through this reform phase.

2. Executive Summary

2.1 We note that the process of developing a statutory definition of Charity in the Australian context has occurred over a number of years. We have made submissions through the previous consultations expressing our views. The comments contained within this submission are limited to what we view as the practical implications of the draft statutory definition in the following areas:

- Definition of “advancing”
- Public Benefit Test
- Disqualifying purpose – public policy condition
- Advancement of religion
- Charitable purpose
- Sustainability of Charities
- Definitions across jurisdictions
- Transitional Draft bill

3. Feedback and Comments

3.1 Definition – “Advancing”

3.1.1 Section 3(1)

3.1.2 We note that the term “advancing” is defined in the draft bill as “*protecting, maintaining, supporting, researching and improving*”. We also note that the draft bill incorporates references to advocating for a charitable purpose. To confirm the approach that advocating for a charitable purpose is permissible, we recommend that “**advocating**” is incorporated into the definition of “advancing”.

3.1.3 We are also of the view that “**sustaining**” should be incorporated into the definition of advancing. This would be consistent with the Government’s position on long term sustainability of the NFP sector as outlined in the National Compact as well as providing support for the appropriate use of funds to sustain a charitable purpose.

4. Public benefit test

4.1 Section 6(3)

4.1.1 We consider the matters set out in Section 6, regarding the public benefit purposes for an entity to qualify as a Charity, are reasonable. We note that the commentary makes mention of reasonable remuneration and refers to the proposed Not-for Profit definition and respective transitional arrangements.

4.1.2 We recommend that any reasonable remuneration test be applied in a consistent manner between Charities and other Not for Profit entities and that no higher standard be applied to Charities by virtue of them being a Charity.

4.2 EM Paragraph 1.61

4.2.1 Overall we support the concept that a Charity should not be able to provide a private benefit. Furthermore we acknowledge and support the incorporation into the draft bill proposed exceptions, particularly in relation to Indigenous charities.

4.2.2 We refer to the valid comments incorporated in paragraph 1.61. We encourage further clarity to be included surrounding the exceptions as well as the link between private benefit and receiving benefits as a member of the public. We are of the view that additional clarification of this matter in the EM will provide better guidance to those administering Charities as to the extent to that private benefits may be obtained.

4.3 EM Paragraph 1.67

4.3.1 We note the comments in this paragraph which identifies that this presumption can be challenged by relevant parties and that any challenge would be considered by the courts. We note that there is no proposed mechanism for a challenge to be dealt with through a more cost effective process prior to referring it to the courts.

4.3.2 We recommend that an appropriate mechanism be incorporated into the ACNC regulatory approach to reduce the additional cost and expense which would be incurred through a formal legal challenge.

5. Disqualifying purpose – Contrary to public policy

5.1 Section 10 (a)

5.1.1 This proposed sub section disqualifies an entity from being a Charity that engages in, or promotes activities that are contrary to public policy. We appreciate that the examples provided in support appear reasonable. We understand that the test as to what is contrary to public policy is based on the principles which guide ‘public opinion,’ these are not defined in either the draft bill or the accompanying explanatory memorandum.

5.1.2 Given the significance of a disqualifying purpose, it is critical that a Charity’s status is not open to challenge at the whim of any individual or Government. We recommend that what is meant by being contrary to public policy is more clearly articulated and defined.

6. Advancement of Religion

6.1 Section 11(1) (d)

6.1.1 We note this sub section incorporates into the draft bill the advancement of religion from the common law definition. We also strongly support the presumption of public benefit for this charitable purpose and welcome its incorporation into the draft bill.

6.2 EM Paragraph 1.96

6.2.1 Paragraph 1.96 refers to “immediately religious”. One of the fundamental approaches to evangelisation, or its equivalent, within the current Australian context is to provide a link between the family unit, social life and religion. In our view, the purpose of the establishment of a number of organisations which fit this description, have the underlying and long term purpose of advancing religion. This advancement is undertaken through the demonstration of a faith based approach to a wide range of activities.

6.2.2 We recommend, where there is endorsement of an entity by the governing body of the relevant religion, that these organisations should be considered to have the presumption of the advancement of religion on the basis of evangelisation or its equivalent.

6.2.3 We recognise that the comments in the EM are appropriate where there is a tenuous link between the religion and the organisation.

6.3 EM Paragraph 1.97

6.3.1 We note the commentary in paragraph 1.97. We appreciate that in drafting this commentary, Treasury is mindful of the extreme position some may take with regard to “in the name of religion”. However, we note that a fundamental tenet of faith for a number of religions is the promotion of the undertaking of “good works” in the practice and development of its followers.

6.3.2 In this context, there are a number of organisations which undertake good works in the name of religion and therefore have an underlying purpose of advancing religion. An acknowledgement of their religious position is important to the development and sustainability of their charitable purpose.

6.3.3 On this basis, we recommend that Treasury give due consideration to the ability of these organisations, to be classified as having the charitable purpose of advancement of religion, providing they are endorsed by their spiritual leaders.

6.3.4 In addition, we seek clarity in the draft bill as to entities able to be considered as “for the advancement of religion” without any impact on their tax concession status where they are currently considered to be public benevolent institutions, health promotion charities or deductible gift recipients.

7. Charitable purpose

7.1 Section 11(1)(k)

7.1.1 We recognise that one of the underlying purposes for the “codification” of the definition is to provide clarity and consistency in relation to the application of the term ‘Charity’ at a Commonwealth level.

- 7.1.2 We refer to the proposed section 11(1)(k) which essentially provides a catch all provision in relation to those purposes which come under the preceding charitable purposes within this section.
- 7.1.3 The scope of this provision appears narrower than that covered by the fourth head of Charity as espoused in the Pemsel's case (*other purposes beneficial to the community*). The proposed section requires the purpose to be analogous or within the spirit of the previous purposes. Prima facie, this proposed section is arguably narrower than the common law definition. We recommend that additional commentary be included in the EM to assist with the interpretation of "*analogous*" and "*within the spirit*".
- 7.2 EM Paragraphs 1.28- 1.37
- 7.2.1 We draw your attention to the commentary in this paragraph regarding the charitable purposes of an entity. We support the concept that a Charity should not have a purpose which is not a charitable purpose.
- 7.2.2 However, the commentary results in confusion in relation to the interaction between purpose and activities. We recommend that additional consideration be made to more clearly define what is considered a purpose for entities seeking to determine if they are a Charity.
- 7.2.3 For example, it has been specifically stated that a Child Care Centre is to be classified as a Charity under this legislation. The activity in this case operates in the nature of a business operation but its purpose is charitable. We anticipate that there are a significant number of charities whose purpose is fundamentally charitable but their activities could be considered in the nature of business.
- 7.2.4 We recommend further elaboration of the concept of purpose versus activity to provide clarity and acknowledgement under the law that purpose is the intent, mission and underlying "*raison d'être*" of an organisation and that these various activities are a means to achieving this purpose.
- 7.2.5 We further recommend that Treasury consider the EM commentary in light of the consultation paper on "Better targeting of tax concessions" and the potential interaction of these two proposed pieces of legislation to ensure that there is a consistency in application of the tax concessions between charities and other not for profits.

8. Sustainability

8.1 EM Paragraph 1.26 and 1.27

8.1.1 It is to the public's benefit that charities are well run with long term sustainability a cornerstone. Sustainability for a Charity as with any organisation requires appropriate levels of funding to provide long term infrastructure needs, manage risk and associated solvency requirements. This requires the accumulation of funds over an extended period of time. The nature and extent of the accumulation is fundamentally driven by good governance and the underlying nature of operations.

8.1.2 We are concerned that the comments made in the abovementioned paragraphs fail to appropriately consider these requirements in the context of a charitable purpose. In addition, the wording might lead the public to perceive that charities with accumulated funds are not meeting their obligations.

9. Definitions across jurisdictions

9.1 We note the current variance in tax concessions and exemptions for charities across the various jurisdictions in Australia resulting from the range of definitions within legislation. As a matter of prudent government policy, we recommend that Treasury consider incorporating a requirement under this draft bill or in separate legislation. This requirement could mandate that the ACNC and the Commonwealth Government actively promote harmonisation or adoption of the statutory definition of Charity at a state level within a specified period of time, say 5 years. Should a transition not be achieved then a parliamentary review of the value of the statutory definition should be undertaken.

10. Transitional draft bills

10.1 We support the period of 18 months provided in the draft bill to allow for a registered entity to consider and make relevant changes which may be required in order to comply with the proposed legislation.

If you have any queries please contact the contributors to this submission listed below:

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Yours faithfully



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