



The
Treasury

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Dear Sir/Madam

Consultation Paper: A Definition of Charity

The NSW Government welcomes the Australian Government's consultation paper on a definition of charity. Charities play an essential role in the planning, management and delivery of services in NSW, and are significant contributors to building a fair, sustainable and more inclusive society. The NSW Government also acknowledges and values the sector's contribution to the economy and community development.

The Charity sector in NSW is large and complex and an important section of the broader Not-for-Profit (NFP) sector. There is significant diversity in the scale of operations, range of services, geographical spread, organisational philosophies, dependence on government funding, and sophistication of business models.

Many more NFPs in other sectors – including in the arts, trusts, sport and environment – also receive funding and other support from NSW Government agencies. NSW agencies are working to implement substantial reforms to improve the allocation of funds and reduce the administrative burden related to receiving government funding.

Supporting and developing the NFP sector is a key priority for the NSW Government. Substantial consultative and advisory mechanisms are in place, which support the extensive range of initiatives currently underway to assist the sector. These provide a forum for NFPs, including charitable organisations, to engage with agencies about regulatory and other issues and exert influence over policy decisions.

I am pleased to be able to submit NSW Treasury's comments on the consultation paper on a definition of charity and look forward to continuing the consultation process to deliver beneficial regulatory reforms for charities and the broader NFP sector.

Yours sincerely

Philip Gaetjens
Secretary

NSW Treasury Submission

Consultation Paper: A Definition of Charity

1. Introduction

In its 2011-12 Budget the Commonwealth Government announced that it will introduce a statutory definition of charity, applicable across all Commonwealth laws from July 2013. The Commonwealth's hope is that in the longer term there will be single definitions of 'charity' and 'charitable purpose' for all purposes and for all levels of government.

The current meaning of charity and charitable purpose has been refined through centuries of common law and each Australian jurisdiction applies the common law interpretation of charity for its own purposes. While this situation can lead to inconsistencies these would only be at the margin as the common law definition of charity is generally recognised across all Australian jurisdictions.

A number of reports have recently recommended that the Commonwealth introduce a statutory definition of charity. NSW Treasury notes there are compelling reasons to support a statutory definition of charity which may have the ability to provide more certainty. However, for a reduction in regulatory burden to be achieved, the statutory definition should provide a clearer and more certain definition than that which is currently provided by the common law. Unless ambiguity is reduced, a statutory definition may impose administrative and regulatory costs without producing any benefits. Furthermore, it needs to be acknowledged that a statutory definition can still be impacted by decisions of the courts.

Under the Commonwealth's proposal, a definition of charity will be legislated for the purposes of all Commonwealth laws and registration as a charity will be administered by the Australian Charities and Not-for-profits Commission (ACNC). Individual agencies will continue to assess eligibility for individual program funding, contracts or tax concessions and to administer sector specific regulatory functions. Initially, the definition will be applied to Commonwealth legislation only but may provide a platform for a harmonised definition across all jurisdictions.

2. Issues in defining charity

The common law approach to defining charities has created some anomalies and confusion. There is benefit in clearly defining what a charity and what a charitable purpose is. Legislation to codify the common law will go part way to addressing this and will allow amendments to be made, reducing the amount of litigation. But it would be beneficial for the statutory definition to be even clearer than current common law in order to deliver greater clarity and certainty to the charitable sector.

NSW Treasury believes there are compelling reasons to support the broad elements that an entity must satisfy to be defined as a charity in the consultation paper. Whether an entity is charitable having reference to their objects or activities, will need to be clearly defined to reduce the number of decisions being made 'on balance' and hence the number of objections leading to litigation.

The case for adopting a single or harmonised definition may be less convincing in respect of other laws where the impact would be minimal, where the area of regulation is outside the objects of the reforms, or where there are other policy reasons for retaining the existing definition. For example, many wills provide for charitable purposes on the basis of the existing common law definition and the *NSW Succession Act 2006* refers to charitable purposes. Introducing a new statutory definition to trust and succession laws may create

confusion and uncertainty with respect to existing and future testamentary charitable trusts, with little apparent benefit.

The Consultation Paper queries whether a statutory definition of charity should reflect the common law position that the purposes of a charity must be 'exclusively charitable'. This reflects the approach taken in the English definition of charity. However, NSW Treasury notes that it may be less flexible than the 'dominant purpose test' and may not reflect how charities operate in contemporary Australia, where charitable organisations may often be supported by ancillary and incidental non-charitable purposes.

NSW Treasury agrees that the various impacts and benefits of amending the definition will need to be considered in greater detail. This should also have regard to the extent to which further conditions are able to be imposed under other issue specific laws.

NSW Treasury considers there are compelling reasons to consider whether an organisation should operate for the public benefit to be defined as a charity. This is particularly important if the charity is seeking public support through tax exemptions or concessions. NSW Treasury also considers that further consideration should be given as to whether public benefit should be demonstrated rather than assumed to promote transparency and confidence in the charitable sector. For most charities, this demonstration of public benefit should not be difficult to satisfy. It is also important to have a clear definition of 'sufficient section' so that legitimate people and organisations are not excluded from receiving appropriate tax concessions. It may be more suitable to attempt to apply special circumstances around the description of 'sufficient section' within more specialised laws applying to the specific issues.

NSW Treasury notes that whilst there may be benefit to organisations with the proposed statutory definition and associated establishment of the ACNC, it will be important to quantify the impact for charitable organisations, particularly for smaller and State based organisations. Assessing this impact is critical, keeping in mind the recommendations of the Productivity Commission's report on the *Contribution of the Not-for-Profit Sector* to minimise burden on the NFP sector and COAG's ongoing commitments to reduce red tape.

The activities conducted by a charity should be in furtherance or in aid of its charitable purpose. While NSW Treasury does not suggest that all political activity should be disqualified in light of the *Aid/Watch* decision, it is important to explore those circumstances and situations where attempting to change the law or government policy may lead the organisation to take inappropriate actions.

3. Charitable purpose

NSW Treasury notes there are compelling reasons to support a comprehensive list of charitable purposes to provide greater certainty and clarity. This is particularly so for purposes currently classified as 'other purposes beneficial to the community' which do not fall under the heads of the relief of poverty, advancement of education and advancement of religion.

It is likely to be particularly important that the list is limited to those purposes that have a strong recognition in the existing common law and that future changes to this list are very carefully considered.

A statutory definition of charity would enable governments to update this list of charitable purposes as required. This would have the benefit that litigation would no longer be the only mechanism to seek clarification of the meaning of charitable purposes. However, a statutory definition could also enable the list to be expanded to include purposes that have not been proven in the same way as currently accepted charitable purposes have.

State and Territory issues

Charities make an important contribution to NSW and the NSW Government engages with the sector in a number of ways. For example, the Government contracts with charities to provide services, provides various tax exemptions in recognition of the contribution charities make to society, and regulates parts of the sector to ensure that charitable funds are used in an appropriate manner.

NSW Treasury is committed to reducing the regulatory burden on the charitable sector to allow organisations to focus resources on the important services that they deliver. As such, the NSW Government must carefully consider the impacts of any proposed changes to ensure that it produces better outcomes for NSW charities.

In considering a harmonised definition of charity, the NSW Government must ensure that it does not produce unintended consequences and that the state maintains the ability to provide assistance to NSW charities in the most effective manner. In addition to tax law, the NSW Government must also consider the impact a harmonised definition of charity would have on a range of other laws such as trust law, fundraising law and incorporated associations law.

It is important to note that endorsement as a charity under the statutory definition will be separate to the assessment of eligibility for tax exemptions. Paragraph 32 of the Consultation Paper states that from 1 July 2012 the ATO will accept the ACNC's registration of charities based on current law. However, the ATO will continue to have the ability to assess whether other special conditions contained in the taxation laws are met. If a harmonised definition of charity is implemented, states would retain the right to develop taxation policy and administer those taxes as appropriate. Therefore, the introduction of a statutory definition of charity would not reduce the power of the NSW Office of State Revenue to continue to assess eligibility for tax exemptions under NSW tax legislation.

Tax exemptions and concessions are provided to various entities and under various circumstances. Some of these are for charitable organisations, but others are not. Although NSW confers tax exemptions on entities with a purpose recognised as charitable (e.g. educational and religious institutions), under NSW tax legislation these entities are sometimes identified as a separate category from charities, not merely a sub-set of charities. Further consideration is required of what issues are actually created by this and whether substituting such references with a broad, encompassing definition of charity would mitigate these issues or create new issues.

In some cases, a government may wish to legislate specific arrangements for a sector or group of organisations with a similar purpose or service, but they will not all be charities; some organisations may be not-for-profit, businesses or government based, such as the early childhood education sector.

Consequently the need to specifically mention these types of subsets of charity may remain and it is important that governments continue to be able to identify tax-exempt entities separate to those that fall under the definition of charitable purpose.

It is apparent that there are many technical and policy issues to consider in the consultation process and NSW Treasury will continue to work with the Commonwealth and other jurisdictions in regard to the definition of charity with a view to promoting harmonisation wherever possible.