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**Re: Exposure Draft: *Charities Bill 2013*; and
Exposure Draft: *Charities (Consequential Amendments and Transitional Provisions) Bill 2013***

Thank you for the opportunity to comment on the draft Charities Bills 2013. Given the short time frame, Philanthropy Australia will comment only on those provisions in the Bill which have most impact on our Members and the philanthropic sector in general.

Part Two, Division 2, Section 6 - Purposes for the public benefit

This section of the Bill introduces new concepts which do not exist in common law and which are not adequately explained in the Bill or explanatory material. They are:

- “a universal or common good” (6(1)b)
- “real overall value to the public” (6 (5))

Creating these new concepts will lead to a necessity for extensive guidance and possible challenges for individual organisational clarification. Philanthropy Australia recommends that this section of the Bill be redrafted to remove paragraphs 6(1)(b) and 6(5).

Part Two, Division 2, Section 7 – Certain purposes presumed to be for the public benefit

This section is somewhat confusing because the wording makes it clear that the presumption is of *benefit* and not of the benefit’s *public nature*. The definition of *public* is covered in section 6. Philanthropy Australia suggests that a redrafting of section 6 of the Bill would make both sections 6 and 7 clearer, section 6 then being about the definition of *public* and section 7 about situations where a benefit is presumed.

Part Two, Division 2, section 8 – Purposes of native title holding entities that are directed to the benefit of Indigenous persons who are related

Philanthropy Australia endorses enabling charitable entities (including trusts) to be established for the benefit of native title groups and suggests that the drafting of this section should be reworded to better reflect the policy intention of removing the public benefit test where the purposes are charitable and are directed to a native title group. Philanthropy Australia considers this section would be better included in section 9 as it is one of the situations where the public benefit test does not apply.

Part Two, Division 2, section 9 – When public benefit test does not apply

Philanthropy Australia draws the attention of Treasury to the existence of necessitous circumstances funds, as well as charitable trusts which exist for the relief of poverty for family groups, employer connections or for certain sections of the public. Many such trusts have been in existence for decades and may not be able to prove a public benefit. Philanthropy Australia suggests that there should be grandfathering provisions to preserve the charitable status of those current trusts as well as wills that have been drafted on that basis.

Part Two, Division 3, section 10 – Disqualifying purpose

Philanthropy Australia disagrees that “the purpose of promoting or opposing a political party or a candidate for public office” (10(b)) should be a disqualifying purpose. Certainly a charity’s sole purpose should not be to promote or oppose a candidate or political party; however, Philanthropy Australia cannot see any reason why a charity should not be permitted to advocate support of a particular candidate for public office, or a particular party, if the candidate’s policies will directly further the charity’s charitable purposes - or equally to oppose a candidate whose policies would run counter to the charitable purpose of the organisation.

Part 3, section 11 – Definition of charitable purpose

Philanthropy Australia believes that line 5 should be redrafted to read “*charitable purpose* includes any of the following:” and that item (k) should also be redrafted to read “any other purpose for the public benefit”. As currently drafted, the wording does not fully capture the current fourth head of charity and there is the potential for uncertainty around some of the existing entities which have been endorsed under the fourth head. As one of the principles behind the statutory definition of charity is that it will preserve the common law, Philanthropy Australia suggests that redrafting the section to “include” rather than “mean” items (a) to (l) will ensure that the current law is preserved.

Part 3, section 12 – Funding charity-like government entities

This section is clearly intended to enable charitable trusts to retain their own charitable status even if they fund charity-like government entities. The intention seems to be to clear up some of the complication surrounding the existence and funding arrangements of Income Tax Exempt Funds (ITEFs). Accordingly, the *Charities (Consequential Amendments and Transitional Provisions) Bill 2013* repeals Section 50-20 of the *Income Tax Assessment Act 1997* which provides income tax exemption to non-charitable public and private ancillary funds which provide money, property and benefits to income tax exempt deductible gift recipients (DGRs), and under the transitional provisions in Division 2 of Schedule 2, ITEFs will be treated as registered charities. Paragraph 2.23 of the Explanatory Material implies that ITEF status will no longer be necessary once the Charities Bill becomes law.

While Philanthropy Australia appreciates the government’s intentions in including this provision, as drafted it is likely to cause widespread confusion and complication and will not achieve its apparent intended aims. We identify the following issues:

- Firstly, the current drafting of section 12 states that an entity is to be treated as not a government entity if “the purpose includes the purpose of providing money, property or benefits to the government entity, or for the establishment of the government entity”. Philanthropy Australia’s reading of this section is that a trust’s purposes must explicitly include the purpose of funding the government entity. This means that in order to take advantage of this provision, existing charitable ancillary funds and non-DGR trusts will need to amend their trust deeds to broaden their purposes in this way. They will, however, not be charitable in their State for perpetuity, stamp duty, payroll and other State taxes unless they still opt in, in

a manner consistent with state law. The Explanatory Material does not make this clear, or indeed touch on it at all.

- Secondly, there is a lack of consistency between the “opt-in” provisions in different States, some being able to fund any item 1 DGR whether or not it is “charitable but for its connection to government”. Section 12 of the Charities Bill 2013 is therefore likely to increase confusion as entities navigate the different provisions in different States. Additionally, many ITEFs which have opted in the appropriate manner in their state (including those in NSW and Queensland) and are currently able to distribute to all item 1 DGRs will now be restricted under the *Charities Bill 2013*, effectively penalising non-charitable DGRs. This will be a major disincentive for the sector; in some cases it will require further trust deed amendment and in the majority of cases it will cause confusion. Philanthropy Australia recommends that the current distribution authority for existing ITEFs should be grandfathered.
- Thirdly, “government entity” in the *Charities Bill 2013* is defined as “a government entity (within the meaning of the *A New Tax System (Australian Business Number) Act 1999*)”. This is much more restrictive than the current wording in the *Charities Amendment Bill 2006* (Victoria) which takes into account a number of factors to determine whether an entity is connected to government, including the extent to which an entity is under government direction or control. By contrast, the meaning in the *A New Tax System (Australian Business Number) Act 1999* is far more restrictive, defining “government entity” as:
 - (a) a Department of State of the Commonwealth; or
 - (b) a Department of the Parliament established under the *Parliamentary Service Act 1999* ; or
 - (c) an Executive Agency, or Statutory Agency, within the meaning of the *Public Service Act 1999* ;or
 - (d) a Department of State of a State or Territory; or
 - (e) an organisation that:
 - (i) is not an entity; and
 - (ii) is either established by the Commonwealth, a State or a Territory (whether under a law or not) to carry on an * enterprise or established for a public purpose by an * Australian law; and
 - (iii) can be separately identified by reference to the nature of the activities carried on through the organisation or the location of the organisation;whether or not the organisation is part of a Department or branch described in paragraph (a), (b), (c) or (d) or of another organisation of the kind described in this paragraph.

This definition will not include entities set up under statute and controlled by government such as public hospitals. Philanthropy Australia’s reading of this is that such entities will need to be prescribed in order for charitable trusts to be able to fund them with confidence. We understand that a process of identifying entities which would be charitable but for their link to government is under way and are in favour of this process being completed before the definition comes into effect on 1 January 2014.

- And finally, there will be immense confusion about which Private and Public Ancillary Funds have “opted in” as this information will not appear on the ABR, on the ACNC Register, nor in their trust deeds. This may cause problems in later years if corporate history is not carefully curated.

Philanthropy Australia suggests that significant redrafting of this section is needed and that one way to simplify this task would be to allow charitable funds to retain their charitable status if they distribution to any Deductible Gift Recipients (DGRs), whether or not they would be “charitable but for their connection to government”.

Part 3, section 13 – Purpose of advancing social or public welfare

Item (2) of section 13 is overly complicated and will not necessarily achieve the policy aims of this section. Philanthropy Australia suggests that a better way of achieving the aims of this section would be to include

community development as a charitable purpose. Furthermore, Philanthropy Australia suggests that the word “building” should be inserted before “rebuilding”. It is likely that post-disaster situations may arise where a community needs to not just rebuild existing infrastructure but to build something entirely new. For example, after a disaster which caused widespread serious injuries and other physical suffering, a community may need to build a health clinic where it was previously serviced by mobile health services.

Part 4, section 14 – Cy pres schemes

This section notes that “Trust law may, in certain circumstances, allow the purposes of a trust to be altered to remove purposes that are not charitable purposes”. It should also recognise that state trust law also provides a power for non-charitable purposes to be ignored.

Thank you again for the opportunity to provide comment.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Louise Walsh', with a small dot at the end of the signature.

Louise Walsh
Chief Executive Officer