

Spina Bifida & Hydrocephalus Association of SA Inc

Response to Federal Government's Consultation Paper – A Definition of a Charity – Oct 2011

Introduction

We would like to thank the Government for the opportunity to make comment on the Consultation Paper as part of the important reforms relating to a broad based 'Definition of a Charity.'

The Spina Bifida & Hydrocephalus Association of SA Inc (hereafter called "SBHASA") was established in 1965 by a group of concerned parents wishing to secure the best treatment, services and opportunities for their children born with either or both conditions.

Today, we are the primary organization within this state (& the Northern Territory) specializing in the provision of tailored services, education and advice to our members, their family and carers and the community at large in relation to these conditions. We currently have 325 members on our database and SBHASA offers; Outreach Nursing Services, Social Inclusion activities and member subsidies (predominantly medically related), information, education and advice. Whilst SBHASA does provide some assistance to families with young children affected by these conditions, our main focus is on people aged 16 years and over due to restrictions in public sector provided services made available to this adult age group.

We maintain close ties with Public Hospitals and Government Departments that rely on our expertise and work closely with them to ensure the best health and wellbeing outcomes for our members. With limited State Government funding, we rely heavily upon on our own fundraising initiatives in the area of Telemarketing and Doorknock collection programs.

Whilst our initial assessment is that any form of proposed definition of a charity would not negatively impact upon our own status, we are nevertheless concerned at the current numbers of not-for-profit and charitable designated organisations that exist within Australia and support the notion that all should be able to demonstrate their true purpose of operating for the public benefit – or any other associated criteria that the Government should deem appropriate.

Our primary concern relating to this discussion paper is in relation to the administrative load that may be created for organizations during the process of demonstrating they are for the public benefit. As outlined in response to question 7 below, smaller charitable organisations such as ours will often not have spare resources to allocate to administrative requirements beyond those required to effectively manage the organisation and provide services to members. In recognition of this fact, SBHASA implores the Government to consider the resource load that would be created, particularly for smaller organisations, in the ongoing administration associated with demonstrating their charitable status.

ANSWERS TO SPECIFIC CONSULTATION PAPER 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?**
- 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 suggest that further clarification of the Tribunal’s decision be provided by way of wording along the lines of “to support, assist and mentor other charitable organisations” in order to substantiate the purpose of a peak body and justify its own charitable status.

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

The Board of Taxation’s recommendations following their review of the Charities Bill 2003 provided worthwhile clarification in respect that... ‘sufficient section’ be defined as one which is not ‘numerically negligible’ compared with the size of that part of the community to whom the purpose would be relevant (per the Consultation Paper). We agree with this clarification, particularly since our member numbers (325 in SA & NT as above) may not be large in terms of total community numbers yet represent the greater majority of individuals affected within the community since these are significant conditions.

- 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?**
- 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?**

SBHASA does believe the term ‘for the public benefit’ could be further clarified. The meaning of ‘for the public benefit’ under ruling TR 2011/D2 details useful terminology such as “altruistic,” and intending “social value or utility,” and ‘public benefit’ can be further enhanced by reference to the need for such benefits to be identifiable and ‘must be related to the aims,’ as per the guidance material of the Charities Commission of England and Wales.

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?

There needs to be flexibility as to the meaning of 'public benefit' due to the sometimes intangible and difficult to quantify nature of benefits to various sectors of the community. A non-statutory (ie common law) based definition may also be subject to interpretation with parameters deemed too broad and so a clearly articulated definition encompassing all relevant considerations would be preferable.

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?

The greatest consideration may be the availability of administrative resources for some charities to apply to the task of substantiating their charitable status – particularly if this is an onerous and time consuming exercise. This will be exacerbated if the definition of 'public benefit' is unclear or subject to interpretation, or if the compliance process is complex &/or onerous.

As such, SBHASA would suggest there is a strong argument for existing charitable organisations being allowed automatic status, with an extended period of time to substantiate their standing. The length of time allowed to demonstrate the public benefit test should be based upon their organisational size as determined by annual revenue for example (which generally correlates with internal structure and resource availability).

Whilst we support the notion that existing and new organisations should have to demonstrate their charitable status as per the proposed new definition, we strongly urge consideration of the administrative load placed on organisations, particularly scarcely resourced smaller organisations, to demonstrate this on an ongoing and/or periodic basis. As organisations established to provide public benefit, most charities focus their resources on service provision and limit administrative resources as much as possible, therefore if the Government's process is onerous it will most certainly detract critical resources from the operations of the charity and quite likely therefore, negatively impact on the ability to provide the public benefit for which the organisation exists.

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?

In association with the response to question 9. above, SBHASA believe the compliance assessment of the public benefit test should be made as straight forward as possible to minimise administrative work, and make use of existing required documentation for example, such as Annual Reports (incl financial statements).

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

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

It is reasonable to expect a charity's activities be in furtherance or in aid of its charitable purpose. If not, some organisations without a true primary charitable purpose who engage in commercial activities but are seeking to secure income tax exemption status – may simply engage in certain unrelated charitable activities in order to circumvent any shortcomings with its adherence to the charitable definition.

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

SBHASA believes that the role of an organisation's activities is intrinsic to its purpose and so may be required to be articulated in an organisation demonstrating its charitable status. It appears reasonable to assume that the organisation's role should be clearly interconnected with its objectives and aims and that the organisation's role be consistent with its Strategic Plan where one is in place. However, SBHASA would not support the introduction of a definitive and very prescriptive definition of "activities".

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?

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

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

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

Upon face value it appears unclear as to whether by virtue of their connection to government, an organisation should be deemed to be charitable under the provisions of the Charities Bill 2003. The determination as to whether the entity is a 'government entity' or 'controlled by government' is somewhat unclear in terms of determining whether an organisation is "charitable." We believe that an entity which is government funded, either entirely or even only in part may not necessarily be deemed 'controlled by government' if its Board structure and Constitution detail a degree of autonomy that specifies independent decision making processes. There may be a strong argument to suggest that, even with an element of financial support from the government, that an organisations purpose, aims and activities are nonetheless charitable and its status should be deemed so appropriately.

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 purposes under the Bill and the Act specified are at the least more broad than the four heads of charity resulting from Pemsel's case. As such, these instruments provide greater flexibility as to interpretation - which can be viewed as positive enhancements to the original definition. There may always be further additional suggested provisions to add to the list which could add to the relevance of the items and definition detailed - whether in fact it is an exhaustive list will be subject to speculation.

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

As previously stated SBHASA believes that there should be no concerns with our organisation maintaining its charitable status, even with a newly prescribed definition. A suggestion however to expand upon the clarity referred to above could be with additional reference to the inclusion of activities to advance and assist disadvantaged communities or groups isolated by unique medical conditions &/or circumstances.

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

Inconsistency between definitions within different regions only serves to complicate interpretation and resultant compliance related administrative demands. Broad based agreement and recognition of a standardised definition for a charity will assist in minimising excessive use of paid resources and/or the time made available for some organisations by volunteers.

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

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

We agree with the consultation paper's proposition that adequate education be provided in advance of any proposed changes to definitions or other related conditions. On the presumption that an organisation is in fact established for the right (charitable) reasons but may in fact fall short of newly defined requirements for one reason or another, then they should be provided with the opportunity to amend their objectives or aims in line with the newly recognised criteria.

This also applies in a situation where if charitable status is automatically transferred yet there is some question as to ongoing compliance with the necessary definitions, whereby the entity should be given the opportunity to review and amend its purpose in line with adjustments to wording etc.

Please do not hesitate to contact the undersigned if you should seek any further clarification of the detail enclosed.

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