

## **CONSULTATION: CHARITIES BILL 2013 ON STATUTORY DEFINITION OF A CHARITY**

The Western Australian Council of Social Service (The Council) appreciates this opportunity to comment on the draft Charities Bill 2013 and supports the issues raised in the submissions of the Australian Council of Social Service (ACOSS) and Community Employers WA (CEWA) in response to the draft legislation consultation paper as outlined below.

### **About WACOSS**

The Western Australian Council of Social Service (the Council) is the leading peak organisation for the community services sector, and represents 300 member organisations and individuals and over 800 organisations involved in the provision of services to individuals, families and children in the community.

The Council is part of a national network consisting of the State and Territory Councils of Social Service and the Australian Council of Social Service (ACOSS). Our national coverage strengthens our capacity to represent the interests of people in Western Australia across the breadth of state and national agendas.

Each year the Council's member organisations deliver services to hundreds of thousands of Western Australians. The services our members provide include health, community services and development, disability. Employment and training, aged and community care, family support, children and youth services, mental health and drug and alcohol treatment, indigenous affairs, support for culturally and linguistically diverse people, victims of violence and abuse, housing and advocacy.

The Western Australian Council of Social Service speaks with and for Western Australians who use community services, to bring their voices and interests to the attention of government, decision makers, media and the wider community.

### **The timing and sequencing of reforms**

While the Council acknowledges the commitment of the Federal Government to deliver a series of reforms concerning the charitable and not-for-profit sector (including ACNC legislation, ACNC governance standards, COAG Regulatory Impact Assessment, a statutory definition of charity, National Compact, NFP tax reforms and National Disability Insurance Scheme) within this term of Government, we note that, despite supporting and having advocated for these reforms for many years, the sector has consistently expressed concerns with the sequencing and pace of these reforms, and the adequacy of the consultation process.

The Council along with other community sector organisations and peak bodies had raised its concerns about the timing and sequencing of the Commonwealth reforms for the not-for-profit and charitable sector in a number of previous submissions. Despite these explicit concerns we note the concurrent release of consultation papers for the Charities Bill 2013, ACNC Annual Information Statements, and National Compact. The Council and its members consider it unfitting for such important and wide-ranging reforms to be subject to such an inadequate, uncoordinated and time-constrained consultation process. The procession of reform consultations, including the swathe of reforms mentioned before, has severely tested the policy capacity of the sector to adequately respond to these consultations. As stated in the CEWA submission, the process of reform consultation 'does not reflect Best Practice for Engagement with the Sector (as the National Compact Consultation Paper is endeavouring to promote) .....

The Council endorses the recommendation of CEWA that in future a *'minimum 3 month consultation period be set (for each consultation paper) and that Draft Legislation and Consultation Papers not be issued simultaneously (and further, that the not-for-profit sector be consulted on the timing and sequencing of reforms in accordance with the principles of the National Compact – Better Engagement with the Not-for-Profit Sector.'*

### **Draft Charities Bill 2013**

The Council considers the Charities Bill to be an important legislation that brings certainty and clarity to the definition of a charity and supports the Bill, but with the following qualifications as articulated in the draft Charities Bill submissions of ACOSS and CEWA.

In Section 7 of the draft Bill, *'certain purposes are presumed to be for the public benefit'* are limited and exclusive of other categories of purpose deemed to be of public benefit. For example, the categories of 'advancing health' or 'advancing social or public welfare' contained in Section 11 are common and accepted areas of charitable purpose but are excluded from the status of presumption of public benefit in Section 7. As raised in the CEWA submission, the question arises as to why these distinctions of purpose are present in the Bill – it seems that this is a carry-over from the common law definition of charity. The Council prefers a more modern interpretation in the draft Bill and endorses the CEWA recommendation of *'reviewing and simplifying'* (and aligning) the delineations of categories and purpose contained in Sections 7 and 11.

The ACOSS submission raises another point that 'only two of the purposes attracting the presumption – advancing education and advancing religion – are specifically included in the definition of charitable purpose at s.11. The Council endorses the ACOSS recommendation that *'in the interests of clarity and consistency, we recommend that all of the purposes of presumed public benefit be expressly stated in s.11.'*

The Council appreciates the expansion of categories of charitable purpose in Section 11 to reflect the current and changing structure of the charitable sector, and to provide certainty and clarity around what purposes qualify an organisation to be a charity under the Act. Unfortunately, the expansion of categories has raised questions about the exclusion of other specific and common types of charitable purpose as outlined in the CEWA submission:

- Disability Services
- Mental Health Services
- Homeless Services
- Children and Youth Services

- Family Services

The ACOSS submission further recommends the inclusion of *'Relieving poverty, illness and the needs of the aged'* and *'community housing'*. As with the list of purposes outlined above, the Council regards these purposes to be crucial and common areas of charitable work and supports their inclusion in Section 11.

The Council notes from the explanatory material that the charitable purposes specified above would be swept into the 'advancing social or public welfare' category, but considers that the naming and excluding of particular categories has the potential to confuse the public about which types of charitable purpose qualify an organisation to be a charity.

To obtain greater clarity and certainty, the Council endorses the CEWA recommendation *'that the definition of charitable purpose categories in the draft legislation be reviewed and that the above excluded categories be considered for inclusion.'*

Furthermore, the reference to peak bodies in the explanatory material is insufficient and as outlined in the ACOSS submission, the legislation could be improved by providing a clearer definition and be included as a charitable purpose in Section 11. In this regard, the Council endorses the ACOSS recommendation that *'The advancement of citizenship or community development including volunteering, the voluntary sector, or the effectiveness and efficiency of charities' through the work of peak bodies should be specifically included as a charitable purpose in s.1.'*

The ACOSS submission makes a further point regarding disqualification of political purpose, and the potential restriction this could place on a charitable organisation engaged in lawful acts (e.g., analysis and publication of a political party's policy that is pursuant to a charitable purpose). The explanatory material is unclear on this point and the Council shares ACOSS's concern that charitable entities engaged in political activity pursuant to their charitable purpose may face disqualification. The Council therefore endorses ACOSS's recommendation that *'clarification and clear guidance should be provided as to what kinds of political engagement will be considered to be a disqualifying purpose, ideally through a clear reproduction of the current law as it is expressed within TR2011/T4.'*

The CEWA submission refers to Section 11(k) - *beneficial to the general public that may be reasonably regarded as analogous to, or within the spirit of, any of the purposes mentioned in paragraphs (a) to (j) - as a 'catch-all' statement that provides the opportunity of flexibility of determining a charitable purpose. While this section appears to introduce greater flexibility in the making of charitable status determinations, there is also risk of disqualification of genuine applications that ought to receive favourable determinations. In relation to Section 11 (k), the Council has come across numerous instances of long delays and unequal and inconsistent treatment in the making of such determinations. The Council therefore endorses CEWA's recommendation that 'those responsible for determining the applicability of the definition maintain an inclusive approach to applications made under this Section (and further, that the making of such determinations conform to acceptable standards of consistency and expeditiousness).'*

Another concern of the Council as outlined in the ACOSS submission is the arbitrary nature of the distinction between a charitable purpose and an ancillary purpose and the affect this would have upon related reforms: the example of the 'better targeting of tax concessions, 'a reform which focuses on *activities* undertaken by charities and how these sit beneath the charitable purpose. In relation thereto, the Council supports ACOSS's position that *'where activities are being carried out*

*within the accepted terms of charitable purpose, they ought to be able to access the tax concessions that show society's support for those activities.'*

The Council is also concerned that the rebuttal of the presumption of public benefit creates uncertainty about how and when a rebuttal might or would occur; the necessary level of evidence; and how an entity that does not fall within the presumption proves public benefit, as outlined in the ACOSS submission. The legislation would be improved by providing greater detail and clarity in the explanatory materials particularly in relation to how harm and detriment will be assessed once the presumption of public benefit is displaced - harm and detriment may include safe sex education, needle exchanges and drug and alcohol services. The ACOSS submission further states that it needs to be made clear that the public benefit test will only be failed if the detriment caused by a charitable purpose is so serious that it far outweighs the public benefit. The Council shares these concerns with ACOSS's and supports its recommendation that *'Public benefit ought to be assessed with reference to the human rights that Australia recognises and a clear statement should be included that the public benefit test will only be failed where the detriment or harm occasioned by any charitable purpose is so serious that it far outweighs the public benefit.'*

The Council concludes by welcoming the introduction of the draft Charities Bill 2013, but wishes to reiterate its concern that the passage of the bill has been untimely and out of sequence with the passage of the Australian Charities and Not-for-Profit legislation. Had the Charities Bill, which had been gathering dust for some time, been introduced first before the COAG Regulatory Impact Assessment (which should have been conducted before enacting the ACNC legislation) and the ACNC legislation, there would have been greater clarity and less contention surrounding the ensuing debate.

Yours sincerely

**Francis Lynch**

Chair

WA Council of Social Service