FUNDRAISING INSTITUTE AUSTRALIA
SUBMISSIONS
PHILANTHROPY AND EXEMPTIONS UNIT
THE TREASURY

A DEFINITION OF CHARITY

About Fundraising Institute Australia (FIA)

Established in 1968, FIA's purpose is to make the world a better place by advancing professional fundraising through promotion of standards, professional development pathways and measurable credentials so that our members achieve best practice.

The FIA has developed the Principles & Standards of Fundraising Practice as the professional fundraiser's guide to ethical, accountable and transparent fundraising. The Principles & Standards are vital to how the fundraising profession is viewed by donors, government, the community and fundraisers.

In order to achieve its mission, FIA conducts the following activities:

- Promote and enhance education, training and professional development of fundraisers.
- Provide a resource of fundraising information.
- Advocate for fundraising practice to Government, industry and the community.
- Support and promote certification of fundraisers.
- Develop standards and codes of practice.
- Promote and enhance fundraising as a profession.
- Promote and encourage research into fundraising and philanthropic giving.

Introduction to issues in consultation paper

In this submission, FIA will answer the discussion questions with a view to considering the major issues raised in the consultation paper, which are:

- the requirement for all charities to satisfy a "public benefit" precondition;
- disqualifying purpose (in particular, political support);
- sporting, recreational and social activities;
- government entities

FIA expresses reservations about revisiting or legislating the definitions in the *Charities Bill 2013*.

The Commonwealth enacted legislation in 2004, requiring charities, public benevolent institutions and health promotion charities to be endorsed by the Tax Commissioner in order to access relevant taxation concessions. The amendments extended the endorsement processes currently undertaken by the ATO to all taxation concessions, to which charities, public benevolent institution and health promotion charities are entitled (ATO, 2004a). The changes updated the list of charities, but the same method of self-assessment — 'It is your responsibility to advise the Tax Office

if you are no longer entitled to endorsement' — and hands-off regulation continue (ATO, 2004b:31).

In other words, the entire focus of reform to date has been in taxation compliance, with little regard to informing the donor of the activities and performance of charities. (G. Johns, 'Charities Reform in Australia', *Agenda*, Volume 11, Number 4, 2004, pages 293-306). FIA expresses the hope that the implementation of the ACNC means that compliance with both regulation and taxation is aimed at maintaining public confidence in charities, rather than limiting the role of charities or overburdening them with taxation.

Reform should facilitate charities and their activities, not hinder them. Charities are a significant contributor to the Australia economy and without them, the Commonwealth, State and Territory governments would face a significant burden of financial, administrative and economic activity to fill the gap in services to Australians. Charities should be given ample time to deal with the transition to a statutory definition and to ascertain how it may affect their organisations.

Purpose and public benefit – ss 6, 7, 9, 10. 11 of the Charities Bill 2013

FIA supports the purpose test in the draft legislation, which has been approved in both the High Court and Full Federal Courts, based on the exemption provisions of the *Income Tax Assessment Act 1997 (Cth).*

However, the definition of "public benefit" in the *Charities Bill 2013* is flawed. FIA is not aware of any complaints to its Ethics Committee that any of its organisational members are set up only to benefit such individuals and suggests that this scenario is rare in Australia. Therefore, care should be taken that regulation of charities does not unnecessarily fetter or hamper their activities or distribution of surpluses to beneficiaries through overzealous regulation..

There is no legal, legislative or social consensus anywhere in the world on what is "universal or common good, " rendering this term meaningless. (ss 6(1)(b)) The proviso in section 6(5) that the benefit must be "of real overall value to the public" begs the question of who decides the benefit's value – presumably the ACNC. However, the Bill does not provide sufficient guidance, leaving it open for uncertain interpretation, depending on opinion, rather than an objective set of criteria.

The requirement in ss 6(1) (i) and (ii) that a charity's purpose be "directed to the benefit of the general community or to a sufficient section of the general community" is discriminatory. It could have the effect of excluding charities aimed at benefiting minorities, such as sufferers of rare medical conditions, even though the Explanatory Memorandum specifically states that exclusion of such charities is not intended. A charitable purpose should not be excluded on the basis that only a small minority may benefit from it. Many charities have been founded for just this purpose as small minorities may not be able to avail themselves of government or private services due to their lack of numbers and isolation resulting from their minority status. While this has been addressed in the explanatory memorandum, it has not been addressed in the Bill itself. In this regard, section 6(4) is problematic, as its wording indicates that deciding whether the purpose benefits a "sufficient section" of the general public is in

fact a numbers game by comparing the numbers to receive the benefit against the numbers of that section in the general public.

Disqualifying purpose - s 10 of the Charities Bill 2013

It is not clear why "promoting or opposing a political party or candidate for political office" is a disqualifying purpose under s 10(b) of the Bill. While this is a traditional exclusion under the English common law, it is not applicable in light of the High Court's progressive decision in *Aid/Watch Incorporated v Commissioner of Taxation* [2010] HCA 42 ("*the Aid/Watch case*"). The High Court agreed that there is an implied right in the Australian Constitution for all Australian voters to engage in political debate. The Australian Constitution, which is the basis of the Australian political system, allows voters to communicate directly with legislators through referendums, in order to bring about changes in the Constitution. This means that the Constitution itself allows advocacy for legislative and political change and for this reason, the traditional English common law must be adapted to be consistent with the requirements of the Constitution. The outcome for charities in Australia is that there is no general doctrine which excludes political objects from charitable purposes. The decision overturns over 100 years of accepted law on the role and purpose of charities, bringing Australian law up to date with how modern charities work.

This means that charities will now be able to advocate for political change, generate public debate and lobby the government for change on issues that are relevant to the work they do. As charities generally need to raise funds from the general public, it may be counter-productive for them to support particular candidates or parties. However, this is a strategic issue for each charity's Board to assess. There is no policy or Constitutional reason why there should be a blanket prohibition on any such activities.

Sporting, recreational and social activities – s 11 of the Charities Bill 2013

S 11 of the Bill sets out a number of charitable purposes that will be accepted. Note that s 11(1) (k) refers to "any other purpose beneficial to the general public that may reasonably be regarded as analogous to or within the spirit of any of the purposes mentioned in paragraphs 9(a)0to (j)". The Explanatory Memorandum states that sporting, recreational and social activities are not intended to be charitable purposes, although there is a serious argument that such activities, if not operated for commercial purposes, are for the 'public good".

While social, recreational and sporting activities are traditionally non charitable, community based activities do fall within the public benefit test and can be distinguished easily from commercial or professional activities. There seems to be no legal or policy reasons to prevent community based social, recreational or sporting activities from being charitable, provided that the benefits are not conferred on their private members but to beneficiaries in the same way as charities in other categories. They could be defined in the Bill to exclude commercial activities.

FIA notes with approval the inclusion of s 11(1)(l) which allows advocacy in pursuance of a charity's purpose.

International aid organisations – s 11 of the Charities Bill 2013

A number of FIA's members raise funds in Australia for distribution to overseas aid projects. This is a worthy purpose that is complementary to and supportive of the aid efforts of the Australian government, in particular AusAid. However, it is not clear whether such organisations will fall within s 11. For example, s 11(1)(f) is limited to "promoting reconciliation, mutual respect and tolerance between groups of individuals in Australia". It is not clear why this purpose should have a geographical limitation. S 11(1)(l) is the only purpose which specifically refers to "another country." For the avoidance of doubt, s 11 should specifically state that "international aid" is a charitable purpose.

Funding charity-like government entities – s 12 of the Charities Bill 2013

FIA submits that this section is somewhat confusing and its application unclear. Government entities are specifically excluded as charities under s 5(d) of the Bill, whereas s 12 leaves the door open for the government to set up some kind of entity operating as a charity. If the section is aimed at permitting government funding for charities, then it should be made clear. This comment also applies to s 13(2)(d)(ii) of the Bill.

The definition of "government entity" has serious implications for many community organisations. Many such organisations currently have charitable tax deductible gift status and receive at least part of their funding from government sources. Government routinely funds organisations to do charitable work not done by the State, on the understanding that the funds will be augmented by additional monies from other non-governmental sources. Not only does this often result in considerable services to the community at minimal public cost, it also facilitates relationship building between the community sector and financially privileged individuals and organisations and raises awareness and understanding of social justice issues. If such community organisations are denied recognition as charities, the funds from private individuals and organisations will be less likely to be forthcoming. Consequently, the work provided by those community organisations may no longer be performed and the valuable relationships between the private sector and the community will be diminished.

Conclusion

FIA has previously opposed the introduction of a statutory definition of charity because previous attempts (eg the *Charities Bill 2003)* did not reflect modern charities or meet the needs and expectations of Australians in the 21st century. FIA notes that many of its objections have been addressed in the *Charities Bill 2013* and FIA has noted its support for these. If FIA's further suggestions are taken on board, the Charities Bill 2013 will be a robust support to modern Australian charities.