

**INQUIRY INTO THE DEFINITION
OF CHARITIES AND
RELATED ORGANISATIONS**

Issues Paper

10 November 2000

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TERMS OF REFERENCE

Inquiry into the definition of charities and related organisations

1. The Committee is to examine and report on existing definitions of charitable, religious and community service not-for-profit organisations, having regard to the following:
 - (a) the attributes, purpose and behaviour of such organisations in light of the current social expectations and experiences; and
 - (b) those organisations that are wholly or partially charitable, religious or community service not-for-profit.
2. The Committee shall examine:
 - (a) any current definition set out in legislation (Commonwealth or State), common law or popular usage, including the continuing relevance of the 'public benevolent institution' definition;
 - (b) any current use of the concepts for social, economic, legal, regulatory, statistical or academic purposes; and
 - (c) definitions used in overseas jurisdictions.
3. In undertaking the Inquiry, the Committee is to advertise nationally, produce an issues paper for public comment and consult with key interest groups and affected parties, including, but not limited to:
 - (a) organisations that consider themselves to be charitable, religious or community service not-for-profit organisations;
 - (b) for-profit organisations that provide the same goods or services as those operating in the charitable, religious or community service not-for-profit sector; and
 - (c) Commonwealth, State and local government agencies that provide the same goods or services as those operating in the charitable, religious or community service not-for-profit sector, or that are assisted in the provision and distribution of publicly-funded goods or services by organisations in the charitable, religious or community service not-for-profit sector.

4. The Committee will provide options for enhancing the clarity and consistency of the existing definitions in Commonwealth law and administrative practice with respect to charities, religious and community service not-for-profit organisations. These should lead to legislative and administrative frameworks at the Commonwealth level that are appropriate for, and adapted to, the social and economic environment of Australia.

5. The Committee shall report on the findings of the Inquiry by March 2001.

18 September 2000

MEMBERSHIP OF THE INQUIRY

The Chairman of the Inquiry is the Hon Ian Sheppard AO QC, former Judge, Supreme Court of NSW and Federal Court of Australia. The other members of the Inquiry are Mr Robert Fitzgerald AM, Commissioner of Community Services NSW and former President of ACOSS, and Mr David Gonski, Principal of Wentworth Associates and member of the Prime Minister's Community Business Partnership. The Committee is supported by a Secretariat drawn from a number of agencies and located in the Commonwealth Department of the Treasury.

SCOPE OF THE INQUIRY

The Inquiry has been established to provide options to the Government for enhancing the clarity and consistency of the existing definitions of charitable, religious and community service not-for-profit organisations within Commonwealth law and administrative practice.

While the Inquiry is to take account of the existing definitions, it is not constrained by the existing definitions in developing options for change.

The Inquiry is limited to a consideration of the *definitions* that are used in legislative and administrative practice. The terms of reference do not require the Committee to examine or provide options for the appropriate legislative and administrative treatment of charities and related organisations. It follows that the Inquiry is not seeking submissions, and will not be providing comment, on issues related to the taxation or other legislative and administrative treatment of charitable, religious or community service not-for-profit organisations.

The terms of reference also require that the options provided by the Inquiry should 'lead to legislative and administrative frameworks at the Commonwealth level that are appropriate for, and adapted to, the social and economic environment of Australia'. A key part of the Inquiry's task is to examine whether definitions that have been developed through the courts are appropriate.

PURPOSE OF THE ISSUES PAPER

The terms of reference require the Inquiry to produce an issues paper for public comment and to consult with key interest groups and affected parties.

This Issues Paper is intended to assist individuals and organisations prepare submissions to the Committee. The Issues Paper provides advice on how and where to lodge submissions and discusses the terms of reference and a number of issues on which the Committee is seeking comment. These submissions will be an important source of information to the Inquiry.

This is a public inquiry and any person or organisation is welcome to make a submission. In accordance with the terms of reference, the Committee is particularly interested to hear from:

- organisations that consider themselves to be charitable, religious or community service not-for-profit organisations;
- for-profit organisations that provide the same goods or services as those operating in the charitable, religious or community service not-for-profit sector; and
- Commonwealth, State and local government agencies that provide the same goods or services as those operating in the charitable, religious or community service not-for-profit sector, or that are assisted in the provision and distribution of publicly-funded goods or services by organisations in the charitable, religious or community service not-for-profit sector.

MAKING A WRITTEN SUBMISSION

The comments expressed in submissions and consultations will assist the Committee in developing its report.

In order for the Committee to meet its reporting deadline, your submission will need to be received by no later than **31 December 2000**.

In formulating your submission, please note the issues and questions that have been raised by the Committee in this Issues Paper. However, the matters raised here are not exhaustive, and you may comment on any other matter you consider relevant to the terms of reference.

Please include a succinct 1-2 page executive summary in your submission.

The Inquiry is intending to make submissions publicly available except for commercial-in-confidence or other confidential material provided as part of a submission. **Please clearly mark any confidential material or indicate clearly if you do not wish your submission to be made public.**

It would be helpful if you could send us a written version together with an electronic version on a diskette or as an attachment to an email message. We use Microsoft Word 97 but can deal with a number of formats. As a precaution, we would appreciate your undertaking the appropriate virus scanning of both electronic versions or diskettes before you send them.

Submissions may be sent by email to submissions@cdi.gov.au or by mail to:

Inquiry into the Definition of
Charities and Related Organisations
C/- The Treasury
Parkes Place
PARKES ACT 2600

Any enquiries about making a submission may be directed to the Secretariat on (02) 6263 4346.

Information is also available on the Inquiry's website www.cdi.gov.au.

ISSUES ON WHICH THE COMMITTEE IS SEEKING COMMENT

The Inquiry's terms of reference require the Committee to examine and report on existing definitions of charitable, religious and community service not-for-profit organisations, and provide options for enhancing the clarity and consistency of the existing definitions. In doing so, the Committee is to have regard to the characteristics of such organisations in the light of current social expectations and experiences.

2. This Issues Paper invites comment from interested individuals and organisations on issues related to the Inquiry's terms of reference. The issues raised here are not exhaustive, and it is not intended to provide a comprehensive discussion of all relevant issues. This Paper provides a more detailed enunciation of the Inquiry's terms of reference and raises some questions to help guide the preparation of submissions.

3. Issues in the Paper are discussed under the following broad headings:

- the implications of current social expectations and experiences for defining charities and related organisations;
- existing definitions used in Australia, including the continuing relevance of the 'public benevolent institution' definition;
- existing definitions used overseas; and
- options for enhancing the existing definitions in Australia.

4. Where it is used in this Paper, the term 'charities and related' should be taken to mean 'charitable, religious and community service not-for-profit'. For ease of reading, the Paper from time to time uses the term 'the sector' to refer generically to charitable, religious and community service not-for-profit organisations.

The implications of current social expectations and experiences for defining charities and related organisations

5. Paragraph 1(a) of the Inquiry's terms of reference requires the Committee to examine and report on existing definitions of charities and related organisations, having regard to 'the attributes, purpose and behaviour of such organisations in light of current social expectations and experiences'.

Size and composition of the sector

6. Charitable, religious and community service not-for-profit organisations provide a wide range of services to a wide range of clients. Sources of income vary between organisations, and include government funding, public donations, fundraising, investments and commercial activities.

7. Available data on the sector is not comprehensive or consistent. The Committee will be collating available data to assist in developing a comprehensive definition of the sector. Information on a limited part of the sector involved in the provision of welfare services shows:

- total expenditure on welfare services in 1997-98 was \$10.8 billion, with 64 per cent of this expenditure coming from governments, 11 per cent from the non-government community service sector, and 25 per cent from clients through fees and charges;¹
- in 1996, some 7,518 non-government organisations provided services in the areas of child care, nursing homes and other residential and non-residential care — of these 5,403 (72 per cent) were not-for-profit organisations;²
- some 250,000 people were employed in these same areas of non-government service provision in 1996, of which 73 per cent were in not-for-profit organisations;³ and
- an additional 239,000 volunteers were engaged in the same area of community services activity in 1996, with 89 per cent of these working in not-for-profit organisations.⁴

8. As indicated, these data relate only to organisations in part of the sector. They do not encompass organisations in, for example, the areas of education, religion, health, arts and culture, community legal services, or indigenous community affairs.

The Committee will examine available information on the characteristics of the sector in Australia, and in particular, changes in these characteristics over recent years.

The Committee is seeking input from organisations in the sector, or from researchers and others with an interest in the operation of the sector, to assist in drawing a comprehensive definition of the sector.

1 Australian Institute of Health and Welfare, *Australia's Welfare 1999*, p.13. 'Welfare services' includes services for families and children, the aged, people with a disability and other welfare services such as for homeless people, migrants and prisoners.

2 *Community Services, Australia, 1995-96*. (ABS Cat. no. 8696.0) Table 1.2.

3 Unpublished ABS data reported in Australian Institute of Health and Welfare, *Australia's Welfare 1999*, p.59.

4 *Community Services, Australia, 1995-96*. (ABS Cat. no. 8696.0) Table 1.2.

Attributes, purpose and behaviour of the sector in the current environment, which have relevance for the definition of charities and related organisations

9. In announcing the establishment of the Inquiry, the Prime Minister stated that 'we need to ensure that the legislative and administrative framework in which they [charitable, religious and community service not-for-profit organisations] operate is appropriate to the modern social and economic environment'. (A copy of the Prime Minister's media release is attached.)

10. A central task of the Inquiry is to identify features of the modern social and economic environment which may affect the attributes, purpose and behaviour of organisations in the sector, having regard to the way in which these organisations and their activities may be defined.

11. The Committee notes the following as some examples of how the social and economic environment in which the sector operates has been changing over recent years:

- communities being encouraged to take greater responsibility for developing their own solutions to their problems and needs, through an emphasis on community capacity building and development of social capital;
- a movement within the sector towards a greater focus on self-help, prevention and advocacy activities, and a less predominant emphasis on the provision of direct assistance;
- an increased range and volume of government funded services being delivered by non-government organisations;
- changes in the relationship between governments and the sector, such as:
 - government funding support to the sector being provided increasingly through outcome based funding agreements for the provision of defined services, as opposed to broader grant-in-aid funding;
 - contracts for the delivery of government programs and services through non-government organisations being awarded increasingly on the basis of competitive tendering processes; and
 - the community sector being encouraged to work in partnership with government and business in delivering outcomes for communities and individuals.

The Committee invites charities and related organisations to provide information about their organisation, and about the current social and economic environment they operate in, including how that environment is changing.

What are some of the major social and economic factors affecting the 'attributes, purpose and behaviour' of your organisation, and what are the implications for how your organisation is or should be defined?

What do you think will be some of the major influences on the environment in the coming decade, and what might this mean for how your organisation is defined?

How have your organisation's 'attributes, purpose and behaviour' changed over recent years, and has this involved any change in how your organisation has been or should be defined for various purposes?

The views of government agencies, researchers, for-profit organisations and peak interest groups are also sought by the Committee.

What are the key characteristics of the current social and economic environment for the sector as a whole, and what significance do these characteristics have on how various parts of the sector are or should be defined?

Do these influences impact differently, with different definitional consequences, on various parts of the sector?

Are there factors which impact differently on for-profit organisations delivering similar services to not-for-profit organisations?

Wholly or partially charitable, religious or community service not-for-profit organisations

12. Paragraph 1(b) of the Inquiry's terms of reference requires the Committee to have regard to 'those organisations that are wholly or partially charitable, religious or community service not-for-profit'.

13. There is a range of scenarios for organisations undertaking activities that have a charitable, religious or community service not-for-profit purpose.

- For some non-profit organisations, the charitable, religious or community service activity may be their sole purpose.
- Some organisations may be involved in a range of charitable or religious or community service purposes. For example, religious organisations may conduct a wide range of activities in addition to core worship, pastoral and religious education activities — for instance, the provision of nursing home services to the

aged or welfare services to the homeless or primary and secondary education services.

- Some non-profit organisations may be involved in charitable, religious or community service activities but also engage in other activities that in isolation would not be defined as charitable, religious or community service. For example, an organisation may support its core activities by lobbying on behalf of disadvantaged client groups. Or an organisation may undertake commercial activities to raise funds to support its core activities. These commercial activities may range from manufacturing activities to the provision of financial services or the sale of second-hand furniture, clothing, Christmas cards and puddings, and books.
- Other non-profit organisations may perform charitable, religious or community service activities but these may not be their sole purpose. For example, some community service not-for-profit organisations, in addition to community service activities, may provide social or business networking opportunities for their members.
- Some for-profit organisations may conduct activities which have a charitable, religious or community service not-for-profit purpose. For example, a business may set up a fund to which its owners and/or employees contribute and which is used to fund medical research or to provide equipment for a community centre.

14. These different situations raise a number of issues for defining organisations as wholly or partially charitable, religious or community service not-for-profit.

- Under common law, there is no distinction between wholly or partially; organisations are either charitable or not, religious or not, or community service not-for-profit or not. However, an organisation could be regarded as partially or wholly charitable, religious or community service not-for-profit if the emphasis moves from the organisation as a whole to the activities of the organisation. That is, the purpose of each of the activities, not just the purpose of the organisation as a whole, could be considered. A partially charitable or religious or community service not-for-profit organisation could be determined on some assessment of its individual activities.
- A related issue is whether the *purpose* of the activity or the *nature* of the activity is used as the relevant criterion in a definition, or whether the nature of the activity is to be disregarded.

15. These questions arise regardless of the scope of the terms charitable, religious or community service not-for-profit.

Should definitions be based on the purpose of the activities carried out by the organisation only, or on the nature of the activity?

Should account be taken of multiple purposes, or is it appropriate to rely on the sole or dominant purpose of an organisation in order to define it?

What methodology is appropriate to determine when a purpose is secondary?

For organisations, such as religious organisations, that perform a wide spectrum of activities, is it appropriate to define the various activities differently?

Is it appropriate to distinguish between commercial and non-commercial activities undertaken by charities and related organisations?

Is there an expectation that charities and related organisations will undertake commercial activities in order to perform their core purpose effectively? How should these activities be defined and should they have a role in determining the definition of the organisation?

Existing definitions of charities and related organisations used in Australia

16. As required by paragraph 2 of the terms of reference, the Committee is examining current definitions of charitable, religious and community service not-for-profit organisations in Commonwealth and State legislation, the common law, popular usage, and any current use of the concepts for social, economic, legal, regulatory, statistical or academic purposes. The terms of reference also ask the Inquiry to examine the continuing relevance of the 'public benevolent institution' definition.

17. Charity and related concepts are found in a range of laws and regulations, but these terms are rarely, if ever, defined in legislation.

18. At common law **charity** is generally understood to be:

- a non-profit body;
- providing a public benefit (or providing relief of poverty to limited beneficiaries); and
- with a sole or dominant purpose that is charitable in a technical legal sense, that is
 - the relief of poverty, the needs of the aged and the relief of sickness or distress;

- the advancement of education;
- the advancement of religion; or
- other purposes beneficial to the community.

19. Examples of charities include crisis accommodation services, soup kitchens, home maintenance services for the elderly and frail, guide dog associations, overseas aid organisations, alcohol and drug education bodies, medical research bodies, kindergartens, non-government schools, parents and citizens groups, housing co-operatives for indigenous persons, churches, theological colleges, animal refuges and shelters, public art galleries and public museums. This list is by no means exhaustive.

20. Non-profit bodies that have not been considered charitable are those carried on for sporting, recreational or social purposes, those carried on for political or lobbying purposes, or government instrumentalities carrying out the ordinary functions of government.

21. A **public benevolent institution (PBI)** is an organisation which:

- is a non-profit body;
- is established and carried on for the direct relief of poverty, sickness, suffering, distress, misfortune, destitution or helplessness;
 - the condition or misfortune relieved by a PBI must be such as to arouse pity or compassion in the community;
- is carried on without the purpose of private gain for particular persons; and
- provides direct relief for the benefit of a disadvantaged section or class of the public.

22. Organisations with the primary aim of relieving poverty, sickness or the needs of the aged may be PBIs, for example hostels for the homeless, disaster relief organisations and Braille learning centres for the visually impaired. Counselling organisations that provide services to meet needs requiring benevolent relief, for instance counselling to alcoholics, may be PBIs. Legal aid services may be PBIs where they predominantly handle legal affairs of the needy and underprivileged. Organisations that provide rescue services for people who are lost or stranded, or emergency services for the rescue of people in peril, will also be PBIs if those services are their main purpose and provided the organisation is neither an arm of government nor subject to government control.

23. Examples of bodies that are not PBIs are animal welfare societies, community radio stations, conservation groups, marriage guidance organisations, certain advocacy groups, and medical research and prevention bodies.

24. A **religious organisation** is:

- a non-profit organisation; and
- instituted for religious purposes;
 - where religion refers to a set of beliefs that include a belief in a supernatural Being, Thing or Principle and the acceptance of canons of conduct which give effect to that belief, but which do not go against the ordinary laws.

25. Examples of religious organisations are theological colleges, churches, religious orders and missionary societies. For-profit bodies that sell religious books or other materials and self-betterment groups are not religious organisations.

26. The common law understanding of charity has a number of applications. It applies in the interpretation of charitable trusts and the establishment of charitable companies.

27. At the Commonwealth level, the concepts of charity, PBI, and religious organisation are used, though not exclusively, to determine eligibility for exemption from income tax, exemptions and rebates for fringe benefits tax purposes, and concessions for GST purposes. The concept of charity is also used in the Corporations Law to allow certain organisations to incorporate without the use of the word 'limited' in their name and for exemption from fundraising provisions.

28. At the State level, the concept of charity is used to determine eligibility for exemption from rates, pay-roll tax, land tax and stamp duties and for laws governing fundraising activities.

29. The term **community service not-for-profit organisation** is given a particular application in Commonwealth tax legislation and is not a concept generally used in other laws or regulations.

30. Community service not-for-profit organisations are:

- non-profit; and
- established for community service purposes where the purpose is altruistic.

31. Examples of such community service organisations are the traditional service clubs, non-profit childcare centres, community advisory services and neighbourhood watch. However, sporting clubs, clubs which promote public speaking or debating, clubs which provide a social forum for retired or semi-retired business people and clubs which provide a social forum for expatriates of a particular country are not community service not-for-profit organisations.

32. Commonwealth income tax legislation lists organisations, both by name and type of organisation, that can receive tax deductible gifts. However, this list is not an attempt to define a charity or a related organisation.

33. In some legislation, such as the *Pay-Roll Tax Act 1971* of Queensland, a description is given by drawing on the common law definition and describing those organisations or activities that are included or excluded from the definition for the purposes of that Act. In other cases, such as the *Queensland Trusts Act 1973* and the *South Australian Trustee Act 1936*, the definition of charity is extended to include various recreational bodies that would not normally fall within the common law definition of a charity.

Is your organisation 'defined' as a charity, PBI, religious organisation or community service not-for-profit organisation for the purposes of any law or administrative practice?

Is your organisation 'defined' differently by different agencies or jurisdictions?

If so, does operating under different definitions affect your ability to provide services?

Does the current definition of your organisation impose any constraints on the ability of your organisation to provide services?

Does the current definition of your organisation impose any constraints on your ability to adjust your 'attributes, purpose and behaviour' to respond to changing demands?

Do current definitions allow regard to be taken of the social and economic environment that your organisation operates in?

Do the terms 'charity', 'religious organisation' and 'community service not-for-profit organisation' continue to have relevance in the current social and economic environment?

Do the four 'purposes' of charity in the common law continue to have relevance?

Is the concept of PBI of continuing relevance?

Is there a place for 'direct' assistance to be distinguished from other forms of assistance?

34. An issue that arises in examining the existing definitions of charity and related concepts is whether to base the definitions on the common law or to enact new definitions. Some considerations are:

- the flexibility and adaptability of the law to changing social and economic influences;
- the administrative ease of applying the definition; and
- the level of certainty provided to the sector and administrators.

Should the definitions of charitable, religious and community service not-for-profit organisations be left to the courts or enacted in legislation? What are the advantages and disadvantages of the different approaches?

Definitions used in overseas jurisdictions

35. The Committee is also undertaking an examination of the approach used in overseas jurisdictions and the results of reviews undertaken in other countries. While the common law is generally relied upon in a number of countries such as the UK, Canada and New Zealand, the Committee will also be examining other legal systems which rely more heavily on codification of the law.

The Committee would be interested to hear views on overseas definitions that are considered suitable for adoption in Australia.

If your organisation operates overseas, are there any particular issues regarding the definitions used in Australia compared to those in other countries that affect the international activities of your organisation?

Options for enhancing the existing definitions in Australia

36. Paragraph 4 of the terms of reference requires the Committee to ‘provide options for enhancing the clarity and consistency of the existing definitions in Commonwealth law and administrative practice with respect to charities, religious and community service not-for-profit organisations’. While this requires the Committee to take account of the existing definitions, the Committee does not consider that it is restricted to the existing definitions or their framework in developing suitable options for change.

37. An issue to be considered in developing options for new definitions is what are the appropriate criteria for developing a classification. Those criteria could include issues already discussed in the Issues Paper, such as:

- the purpose of the organisation;
- the nature of the activities undertaken by the organisation; and
- the type of service provided (for example, direct assistance and prevention, advocacy or self-help).

What do you regard as the framework and key criteria that could form the basis for the classification of charitable, religious and community service not-for-profit organisations?

Do you have a preferred definition of a charitable, religious or community service not-for-profit organisation and, if you believe relevant, PBI?

Would it be desirable to split out different types of activities into separate entities for definitional purposes? What would be the implications of such an approach for your organisation?

Is there anything else you consider to be relevant in developing options for new definitions?

38. It is emphasised that this Issues Paper is intended to help persons wishing to make submissions to address matters currently seen as relevant by the Committee. But those making submissions should not feel constrained to deal only with the various questions which are posed by this Paper. The Committee is in the early stages of its consideration of the questions raised by the terms of reference, and is seeking assistance. It will consider submissions on any matter that is relevant to the Inquiry's terms of reference.

Text of Prime Minister's Media Release

Inquiry into charitable and related organisations

Today I am announcing the details of an independent inquiry into definitional issues relating to charitable, religious and community service not-for-profit organisations. In establishing the Inquiry, the Government is honouring the commitment it gave to the Australian Democrats earlier this year to examine such matters.

Charitable, religious and community service not-for-profit organisations play a vital role in our community and are pivotal members of the social coalition. The Government has recognised their importance in a range of policy areas, including the business and community partnership, illicit drugs policy, welfare reform and the Job Network.

We need to ensure that the legislative and administrative framework in which they operate is appropriate to the modern social and economic environment. Yet the common law definition of a charity, which is based on a legal concept dating back to 1601, has resulted in a number of legal definitions and often gives rise to legal disputes.

The Inquiry will provide the government with options for enhancing the clarity and consistency of the existing definitions with respect to Commonwealth law and administrative practice. These should lead to legislative and administrative frameworks appropriate for Australia's social and economic environment in the 21st Century.

I am pleased to announce that the Chairman of the Inquiry is the Hon I F Sheppard AO QC, former Judge, Supreme Court of NSW and Federal Court of Australia. The other members of the Inquiry Committee are: Mr Robert Fitzgerald AM, Commissioner of Community Services NSW and former President of ACOSS; and Mr David Gonski, Principal of Wentworth Associates and member of the Prime Minister's Community Business Partnership.

This membership ensures that community service and business points of view, supported by expert legal advice, will be reflected in the conduct of the Inquiry. I would like to thank all three members of the Committee for making their services available to the Government in this way. A secretariat drawn from relevant Commonwealth departments and the community sector will support the Committee.

The terms of reference for the Inquiry, which were developed in consultation with the Australian Democrats, is attached. The Government considers that wide consultation is a very important element in the conduct of the Inquiry. The Inquiry's terms of reference require the Committee to consult closely with interested groups, including the community service sector and will produce an issues paper for public comment.

I expect the Committee will report its findings to the Government by 31 March 2001. I have asked the Treasurer to oversee the conduct of the Inquiry.

18 September 2000