



**SUBMISSION TO THE COMMONWEALTH GOVERNMENT'S CONSULTATION
PAPER ON THE DEFINITION OF CHARITIES**

DECEMBER 2011

Introduction

Kindergarten Parents Victoria (KPV) is the peak organisation representing the voice of parents in quality early childhood education for Victorian children. Our membership represents over 1,200 early childhood education and care providers such as independent kindergartens, cluster managers, long day care services, integrated services and local governments. We advocate for quality early childhood education for all children and their families.

Over the past 20 years, KPV has worked with parents, kindergarten committees of management, government and other key stakeholders and peak bodies in the early childhood services sector to ensure that Victoria is leading the way in the provision of quality early childhood services to children and that these services are accessible and affordable for families.

Our collaborative approach to advocacy and service development has ensured that KPV is working alongside organisations such as the Victorian Council of Social Services (VCOSS), Gowrie Victoria, FKA Children's Services, Municipal Association of Victoria (MAV), Australian Education Union, Early Childhood Intervention Association, Noah's Ark, Playgroup Victoria, Community Childcare Victoria, WorkSafe Victoria, Monash University and Berry Street to provide a unified voice for change and development. KPV is a well-respected organisation within the early childhood education sector, ranked highly for its commitment, professionalism and expertise on all matters relating to early childhood services.

About this submission

KPV welcomes the opportunity to present this submission to the Commonwealth government's consultation on developing a statutory definition of charity. This submission is informed by KPV's own experience as a not-for-profit peak body and the experience of its member organisations that are unable to access the taxation and other benefits available to a charitable organisation, due to the current definition of a charity and the narrowly defined eligibility criteria for accessing PBI and DGR endorsements.

KPV hopes that this consultation process will pave the way for the modernisation of the definition of a charity and the eligibility criteria surrounding access to many of the tax concessions. This is critical for the viability of many non-profit organisations within our sector, who are striving to achieve the best outcomes for the children within their communities, in an environment of ever increasing demand for services, ever shrinking resources, and ever increasing compliance requirements.

KPV welcomes the inclusion of advancement of education as a charitable purpose and the clarification that advancement of social, or community welfare, includes the care of and the support and protection of children and young people and in particular the provision of child care services. Our response to specific questions in the discussion paper, that are relevant to our business and our member organisations, is provided below:

Question 1: Dominant purpose

The use of the term ‘dominant purpose’ came under considerable scrutiny during the earlier consultations undertaken by the ATO and the test that would be applied to prove the dominance of a purpose, relative to a whole range of purposes, for which an organisation may be established.

The proposal to use the term ‘exclusively charitable purpose’, in our view, does not provide greater clarity regarding the intent of the legislation and can be misleading in terms of defining what an ‘exclusive purpose’ is.

We note the use of the term ‘charitable purpose only’ in the legislations of Wales, Ireland, and Northern Ireland and the use of the terms ‘main’ or ‘predominant’ in recent High court decisions which, in our view, provide more clarity about the meaning of charity.

Question 2: Peak bodies

KPV would recommend that to clarify this matter, which has caused considerable problems for peak bodies in the past, the legislative definition of a charity should clearly state that peak bodies can be charities. Failing to do so and instead relying on the NSW Administrative Tribunal’s decision to clarify the intent of the legislation, creates issues of jurisdiction and the binding nature of a decision by an Administrative Tribunal on a higher court in Australia.

On a related issue, it is disappointing that the current proposal to modernise the definition of charity does not include a definition of Public Benevolent Institutions (PBI). Access to the range of tax concessions currently available to charitable organisations is contingent upon the organisation being endorsed as a PBI. The current definition of PBIs, one of the major categories of organisations eligible to receive tax deductible gifts and FBT exemption under income tax law, requires an organisation to be providing ‘direct relief’ to the needy.

This Common Law definition of a PBI is archaic and very narrowly defined and not relevant to the way in which charities have evolved over time and operate in modern times. The modernisation of the definition of charity alone, without a corresponding effort to modernise all other related aspects that apply to a charity and determine its eligibility to access tax concessions is not only a piecemeal approach, it also fails to utilise the opportunity for a comprehensive review of the taxation issues affecting charitable organisations.

The lack of access to the whole range of tax concessions available to a PBI impacts on the ability of these charities in many different ways:

- Such organisations are excluded from receiving philanthropic funding from trusts or foundations, which will only make a grant to organisations with DGR status, as well as receiving funding from individuals who seek a tax deduction for their gift. Critical research and project work, to provide a strong evidentiary base for advocacy work, is hampered as a result.

- These not-for-profit organisations compete in the same market as organisations with a PBI status for their staff and lack the ability to attract good staff due to their inability to offer attractive salary packaging benefits.

KPV recommends that:

- The government should explicitly state in the statutory definition of charities that peak bodies can be charities.
- In addition, the government should review the range of taxation benefits and concessions available to charities. Where a non-profit-organisation has demonstrated, to the satisfaction of the ACNC, that its main or predominant purpose is charitable and for the public benefit, in addition to being classified as a charity, it should also be able to qualify as a PBI.
- Access to PBI should not be restricted only on the basis that an organisation does not directly provide service to the needy.

Question 6: 'For the public benefit'

KPV would recommend a broad based definition of the term 'for the public benefit' with guidance material providing clarification for ease of interpretation. Care must be taken to ensure that the definition does not limit organisations that are not perceived as providing practical benefits so that these organisations are not disadvantaged as a result.

Questions 7 and 8: Presumption of public benefit

KPV does not support the removal of the presumption of public benefit on two grounds. There is not enough evidence to support the claim in paragraph 83 of the discussion paper that altering the presumption of public benefit may not increase the compliance costs for most charities. At the same time, there is no evidence to support the claim in paragraph 79 that the presumption means that a government authority, in this case the ACNC must, in seeking to regulate and enforce the law, rebut the presumption of public benefit which can often be administratively difficult. It appears that in trying to minimise the administrative burden on the ACNC, the government is seeking to shift the costs and burden to an already stretched charity sector. Instead of removing the presumption of public benefit, KPV recommends that the government provide further clarification regarding disqualifying factors, which may lead to the rebuttal of the presumption by the ACNC. The resources that would otherwise be invested in the ACNC, to support organisations to demonstrate public benefit on an ongoing basis, would also be saved as a result.

Question 10 and 11: Activities of a charity

As long as the activities undertaken by a charity are considered in the context of its main or predominant purpose, KPV sees no issues with the requirement that the activities of a charity be in furtherance, or in aid of, its charitable purposes. The approach adopted by overseas jurisdictions in not including an activities condition in their statutory definitions, but providing provisions strengthening the requirement that the activities of the charity must be in furtherance of its charitable purpose is supported.

Question 12: Disqualifying activities

KPV supports the removal of paragraph (c) “attempting to change the law or government policy” as suggested in paragraph 108 of the discussion paper and the introduction of the clarification suggested therein.

Jurisdiction issues

It appears from the discussion paper that the role of the ACNC is limited to that of determining whether an entity is a charity and registering it as such (paragraph 32) and the determination of the tax concessions will rest with the ATO. This signals a dual process for charitable organisations which will increase the administrative burden and has the effect of negating the establishment of a single NFP regulator and a unified process for approval of charities. Our understanding, based on what is said in the discussion paper, is that for accessing tax exemptions, DGR and PBI endorsements, organisations will still need to apply to the ATO who will make a determination in this regard. It is disappointing that the functions of the ACNC are defined so narrowly and that charitable organisations are left to deal with multiple organisations, yet again, in order to access benefits.