



## **CONSULTATION ON THE DEFINITION OF A CHARITY**

**A submission in response to the draft  
*Charities Bill 2003 (Cth)***

**by**

**Epworth Hospital**

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## Executive Summary

The *Charities Bill* 2003 is a welcome development in providing clarity to charities as to their legal status. It is an appropriate development, some 400 years after the *Statute of Uses*, for this codification to take place.

Epworth Hospital supports the thrust of the Bill, including the list of charitable purposes in section 10 of the Bill.

Notwithstanding this support, Epworth Hospital has a concern regarding the drafting of the core definition of charity as well as the definition of “dominant purpose”.

Epworth Hospital believes that there is no need to introduce a separate requirement of “altruism” into the law of charities. The requirement for a charity to be non-profit and for the benefit of the community already inherently entails an altruistic motivation, as there cannot be a profit motive.



## 1. Who makes this Submission?

### 1.1. The submitter

This submission is made by the Epworth Foundation (ABN 97 420 694 950), a body corporate established under the *Epworth Foundation Act 1980 (Vic)*. The Epworth Foundation operates under the registered Victorian business name “Epworth Hospital” (registration number 1370525S) (hereinafter referred to as “Epworth”).

Epworth distinguishes its services from those of other providers using the following registered trade mark (registration number 879141):



This trade mark visually reflects Epworth’s ethic of patient care in its practice of medicine. The encompassing swirling “e” representing Epworth’s care surrounding a patient. The symbolism of the patient also represents Epworth’s Christian heritage.

### 1.2. Contact details

The contact details for Epworth are:

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## 2. What is Epworth's dominant purpose?

### 2.1 Objects

The objects of Epworth, as contained in section 4 of the *Epworth Foundation Act 1980*, are:

*The Foundation may carry out all or any of the following objects -*

- (a) *to promote and fund medical and health care research of any kind in Australia that is, or is likely to be, of benefit to the community;*
- (b) *to promote, advance and provide financial assistance for medical and other health care education in Australia including, without limitation, the education and training in Australia of medical students, nurses, medical practitioners and others engaged in the provision of medical and other health care services;*
- (c) *to provide financial or other assistance for the purpose of enabling persons residing in Australia to obtain medical or other health care services in Australia which they could not otherwise afford;*
- (d) *to conduct and maintain a hospital or hospitals in Australia;*
- (e) *in relation to a hospital or hospitals conducted and maintained under paragraph (d), to promote the treatment of each patient in a matter that accords the respect due to a person before God, according to the beliefs of the Uniting Church;*
- (f) *to provide medical and other health care services of any kind in Australia;*
- (g) *to provide funds or otherwise assist another entity which does not seek to secure pecuniary profits for its individual members to provide medical or other health care services of any kind in Australia;*
- (h) *to promote and provide funds in Australia for charitable purposes located in Australia and being undertaken solely in Australia including, without limitation, providing funds to an entity or trust whose purposes or objects are wholly charitable and wholly carried on within Australia.*



## 2.2 Mission and Values

The statement of purposes is underpinned by Epworth's Mission and Values:

### ***Epworth: First Choice***

- *Epworth's objective is to be Australia's leading provider of health services.*
- *At Epworth, doctors and staff work in partnership to provide care and service equal to the world's best, for patients, their families and the community.*

### ***The People of Epworth are committed to:***

- *Ensuring that the patient is the focus of all activity.*
- *Providing a place of healing to enable doctors, health professionals and staff to excel at their work in an environment of friendship, compassion and respect.*
- *The partnerships formed with funding agencies and health service providers for the benefit of our patients.*
- *The development and skilled application of clinical, administrative, technological and research knowledge.*
- *Caring for patients and each other as members of the Epworth Community.*
- *Epworth's Christian heritage, enriched by the diversity of the patients, staff, volunteers and their communities.*
- *Helping people to enjoy the best possible health and well-being over the span of their lives.*

## 2.3 Dominant activities

### 2.3.1 The hospital

Epworth's dominant activity is to provide a 500-bed hospital in inner-suburban Melbourne, served by more than 1,300 staff and more than 1,200 accredited visiting specialists. This makes Epworth one of Australia's busiest hospitals.

The Emergency Department is unique in being the only emergency department in a Victorian private hospital accredited to accept time-critical medical emergencies. Accepting 30,000 attendances per annum, the Emergency Department specialises in the core areas of cardiac, orthopaedics and neurosurgery, but also accepts acute general surgery and general medical attendances and admissions. As part of the hospital's Integrated Critical Care Service, it has access to the hospital's 15 operating theatres and 15-bed Intensive Care Unit.

In providing care, Epworth regularly provides concessions to patients who are unable to meet the cost of hospitalisation. Some of these result from presentation to the Emergency Department where the patient is too ill to transfer or there are no beds available in the public sector. Epworth also provides concessions to the clergy.

### **2.3.2 Rehabilitation**

Upon acquisition by Epworth of the Bethesda Hospital in 1998, Bethesda Hospital was integrated into Epworth's existing structure to form the Epworth Rehabilitation Centre ("ERC"). Epworth Rehabilitation Centre provides a range of programs, including:

- head injury trauma rehabilitation;
- orthopaedic trauma rehabilitation;
- pain management;
- acute surgery.

Epworth Rehabilitation Centre specialises in acquired brain injury ("ABI"). Many ABI sufferers are traffic accident victims, under a contract with the Victorian Traffic Accident Commission. Epworth Rehabilitation Centre also has arrangements for treatment and funding with the Victorian Department of Health and Community Services, the Victorian WorkCover Authority and the Commonwealth Department of Veterans' Affairs.

### **2.3.3 Education**

Epworth fulfils a significant teaching role, in accordance with its objects in section 4(b) of the *Epworth Foundation Act* 1980.



Epworth is the only private hospital in Australia to be endorsed to provide advanced vocational training in emergency medicine by the Australian College for Emergency Medicine.

The Centre for Clinical Nursing Research is a collaborative partnership of Epworth Hospital and the School of Nursing at Deakin University, with a focus on clinical nursing research and nursing education. This includes the placement of student nurses at Epworth, as well as assisting and supervising nurses and students with clinical research.

In providing on-going education to the broader medical community, Epworth Rehabilitation Centre conducts numerous conferences for specialists and general practitioners, as well as information sessions for the general public. Specialist conferences have been run in the areas of Cardiology, Rehabilitation, Neurosurgery, Endovascular Surgery and Prostate Cancer.

#### **2.3.4 Research**

Epworth conducts significant medical research, both in its own right and in conjunction with other facilities. Epworth subsidises the activities of the Centre for Molecular Biology.

In partnership with a number of other hospitals, Epworth is currently setting up a prostate cancer research unit.

### 3. Concerns about workability of the legislative definition

#### 3.1 Workability of the core definition

A concern with the workability of the definition lies with the core definition in section 4 of the *Charities Bill*.

##### 3.1.1 Section 4(1)(b)

Section 4(1)(b) states that that the entity must have a “dominant purpose” that is charitable and (with some exceptions) for the public benefit. “Dominant purpose” is defined in section 6, and effectively requires that there be a charitable purpose and that any other purposes are ancillary or incidental to that charitable purpose.”

In common English usage, “dominant” is defined as follows:

- Collins Concise Dictionary (3rd Australian edition): *1. having primary authority or influence; governing; ruling. 2. predominant or primary. 3. occupying a commanding position.*
- Shorter Oxford Dictionary (English edition): *1. exercising chief authority or rule; ruling, governing; most influential. 2. occupying a commanding position.*
- Webster’s Twentieth Century Dictionary: *1. ruling; prevailing; governing; predominant. 2. most conspicuous; overshadowing.*

The use of the expression “dominant purpose” in section 4(1)(b) therefore denotes that a charity is permitted to also have minor purposes that are non-charitable and not ancillary or incidental to the primary charitable purpose.

##### 3.1.2 Section 4(1)(c)

Section 4(1)(c) then states that a charity must “not engage in activities that do not further, or are not in aid of, its dominant purpose”.

##### 3.1.3 Legislative interaction of paragraphs (b) and (c)

The combined effect of paragraphs (b) and (c) is that while paragraph (b) allows a charitable institution or body to have a non-dominant purpose that is not charitable (or ancillary or incidental to the charitable purpose), subparagraph (c)

strictly prohibits the entity from engaging in activities in furtherance of this non-dominant purpose.

The drafting of section 4(1) appears to be internally inconsistent, in that there is an apparent conflict between the drafting of paragraphs (b) and (c). Such legislative conflict can only lead to confusion over the role and place of non-dominant purposes that a charitable institution may have.

### 3.1.4 Looking beyond the *Charities Bill*

A view of the authorities establishes that if a choice must be made between the interpretation of paragraphs (b) and (c), the more limiting interpretation of paragraph (c) is correct. This was established in cases such as *Stratton v Simpson*<sup>1</sup>.

Other authorities reveal a looseness of language, whereby the expression “sole or dominant purpose” is frequently used<sup>2</sup>. This looseness of language is effectively the same as is seen in paragraphs (b) and (c). The concepts of “sole purpose” and “dominant purpose” are not the same, and should not be loosely substituted. This was underlined by the submission of the RSPCA to the Inquiry into the Definition of Charities and Related Organisations, which distinguished between the two by arguing for a “dominant purpose” rather than a “sole purpose” test<sup>3</sup>.

### 3.1.5 Conclusion

In its conclusion to Chapter 12, the *Report of the Inquiry into the Definition of Charities and Related Organisations* advocated the adoption of a “dominant purpose” test<sup>4</sup>. However, its view of dominant purpose was that there should be a charitable dominant purposes, but that there may be ancillary or incidental purposes that are non-charitable beyond the dominant purpose.

As opposed to this, section 4 of the *Charities Bill* includes these ancillary and incidental within the definition of dominant purpose, implying that there may be yet other purposes that are not incidental or ancillary to the dominant charitable purpose. It is this placement of the ancillary and incidental purposes within the definition of “dominant purpose” in the *Charities Bill* that has caused the confusion.

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<sup>1</sup> *Stratton v Simpson* (1970) 125 CLR 138.

<sup>2</sup> TR 1999/D21, paras 24, 103, 105-106 and 111-112.

<sup>3</sup> *Report of the Inquiry into the Definition of Charities and Related Organisations*, page 105.

<sup>4</sup> *Report of the Inquiry into the Definition of Charities and Related Organisations*, page 107.

### **Recommendation 1: Non-dominant purposes**

That the apparent and confusing inconsistency in drafting between sections 4(1)(b) and (c) be eliminated by clarifying the role and place of non-charitable non-dominant purposes.

### **3.2 Other workability concerns**

With exception to the issue of non-dominant purposes, Epworth does not have any concerns over the workability of the *Charities Bill*.

## 4. Administrative burden

### 4.1 Re-endorsement

Epworth is currently endorsed as both an income tax exempt charity (“ITEC”) and a deductible gift recipient (“DGR”) under the *Income Tax Assessment Act 1997* (Cth).

Epworth is concerned about the potential need to become re-endorsed upon the *Charities Bill* becoming law. This would impose an unnecessary administrative burden so soon after the initial endorsement process in 2000.

It is noted that the Frequently Asked Questions published by the Board of Taxation regarding this public consultation on the *Charities Bill* notes that re-endorsement is unlikely. However, this does not constitute an assurance that no requirements will be imposed beyond the periodic self-assessment of continuing entitlement that charities are already required to undertake.

#### **Recommendation 2: Re-endorsement**

Given the stated aim of the legislation not to substantially change the definition of “charity”, that existing ITECs and DGRs not require re-endorsement under the *Income Tax Assessment Act 1997* upon the *Charities Bill* becoming law.

### 4.2 Other administrative burdens

With exception to the issue of re-endorsement, Epworth does not foresee any additional administrative burdens being imposed on it by the *Charities Bill*.

## 5. Necessary flexibility

Epworth holds the view that the “catch all” provision in section 10(1)(g) is adequate for the purposes of ensuring flexibility in the definition of “charity”, provided that the Australian Taxation Office applies the test appropriately.

While a list of examples exists of purposes that are beneficial to the community<sup>5</sup>, this must be treated for what it is: a list of examples rather than an exclusive list.

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<sup>5</sup> For example, the ATO’s *Income tax guide for non-profit organisations* (May 2003 edition), pages 38 to 46.

## 6. The concept of “altruism”

### 6.1 Individual altruism vs. institutional altruism

In imposing any requirement of altruism, it is important to distinguish between individual altruism and institutional altruism.

Individual altruism effectively implies a concept of volunteer labour being utilised by the charitable institution in the pursuit of its purposes. By contrast, institutional altruism refers to the charitable institution voluntarily assuming an obligation towards the wellbeing of others or the community generally.

Modern charities are frequently administered and conducted in a professional and business-like manner. The public and the government demand certain standards for service delivery. Such standards of administration and service delivery necessarily involves professional and trained staff of a quality that can only very rarely be sourced from volunteers. Particularly from the perspective of Epworth, it would be practically impossible to staff a hospital with adequately trained and qualified staff if there was a requirement that these staff be motivated by altruism. Epworth agrees with the conclusion of the Inquiry into the Definition of Charities and Related Institutions on this point<sup>6</sup>.

#### **Recommendation 3: Individual altruism**

In order to reflect the modern standard of services and care demanded from charities, it is important that any requirement for of altruism, if imposed, only apply to the institution, and not to the individuals working for the institution.

A requirement for individual altruism would invariably lead to inferior service standards from charities, to the detriment of the community as a whole.

### 6.2 The effect of government contracts on institutional altruism

In the modern economy, charities frequently work together with government in delivering services to the community. The Commonwealth government’s JobNetwork is a prominent example of this.

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<sup>6</sup> *Report of the Inquiry into the Definition of Charities and Related Organisations*, page 125.

Where such cooperation exists, it is easy to suggest that the charity is not engaged in its activities because it has voluntarily assumed an obligation to benefit the wellbeing of the community, but instead because it has been engaged by the government to do so. Under such circumstances, could the activity still be regarded as altruistic under the definition of a “voluntarily assumed obligation towards the wellbeing of others or the community generally” put forward by the Inquiry into the Definition of Charities and Related Organisations<sup>7</sup>?

Epworth is concerned about the impact of an imposition of a requirement for altruism (in the “voluntary assumption of obligation” sense) on the Epworth Rehabilitation Centre. Epworth has contracts with various government agencies such as the Traffic Accident Commission, the WorkCover Authority and the Department of Veterans’ Affairs to treat patients at Epworth Rehabilitation Centre in return for financial reward at pre-agreed rates. Epworth is concerned that if such a concept of altruism is imposed, Epworth Rehabilitation Centre may need to turn away all patients whose treatment is being funded by government agencies under a broad-application funding contract, as their treatment may no longer be considered to be part of a voluntary assumption of obligation.

#### **Recommendation 4: Government contracts**

Epworth believes that the imposition a requirement for institutional altruism would make it difficult for charities to work together with governments in delivering beneficial services to the community, unless particular care is taken in the way that “voluntary assumption of obligation” element is incorporated into any definition of altruism.

### **6.3 The need for altruism**

Australia’s capitalist market economy dictates that the market is populated by self-interested individuals (both natural and legal persons), seeking to benefit their own interest. In the case of many of these individuals, “interest” equates directly to “profit”.

What distinguishes a charity is that it is not motivated by profit. In fact, the law of charities prohibits the pursuit of any profit-based motivation by prohibiting the distribution of profits to members or other persons. Section 4(1)(a) of the *Charities Bill* makes this clear.

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<sup>7</sup> *Report of the Inquiry into the Definition of Charities and Related Organisations*, page 124.

Since it cannot make a profit, why does a charity seek to benefit the public by pursuing its charitable purpose? It is simply the inherent altruistic nature of the charity that causes it to do so. This underlying concept of altruism is already firmly established in the basic nature of a charity, without requiring it to be expressly stated. The two words of “charity” and “altruism” are practically synonymous already.

An express requirement for altruism can only serve to create the potential problems outlined above under 6.1 and 6.2 by introducing the idea that something more is needed.

#### **Recommendation 5: Need for altruism**

Charities, by virtue of their not-for-profit nature and their charitable purposes, are already inherently altruistic. The imposition of a requirement for express concept of altruism could only serve to impose a further obligation on charities beyond merely benefiting the public for no personal profit. Such an additional requirement is unnecessary and overly onerous.