

Compendium of issues raised - Updated Commissioner's Interpretation Statement: Health Promotion Charities

This compendium provides responses to feedback received in relation to the ACNC's public consultation on a redraft of its Commissioner's Interpretation Statement: Health Promotion Charities (HPCs). It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide advice or guidance, nor does it set out the ACNC's approach to determining whether a charity is an HPC.

Summary of issues raised and responses

| Issue number | Issue raised | ACNC response |
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| Background | | |
| 1 | The introduction of the HPC DGR category recognised that there are charities that promote the prevention or control of diseases which did not come within the tax endorsement category of a public benevolent institution (PBI) – this information is included in the current HPC CIS at paragraph 1.2 and is helpful so should be retained. | We have decided not to include historical information about the introduction of the HPC DGR category in the updated HPC CIS because we consider that the information no longer assists with understanding the meaning of HPC. The HPC DGR category has existed for more than 20 years. Tribunals have considered the scope of its meaning several times since its introduction. |

| Requirements for registration as a charity | | |
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| 2 | The HPC CIS should include information about the requirements for registration as a charity, so that readers understand that an HPC must also meet those requirements before it can be registered as an HPC. | Paragraph 6 of the updated HPC CIS now includes a section discussing the requirements for registration as a charity. Paragraph 7 refers the reader to the ACNC website for more detailed guidance about the general charity registration requirements. |
| 3 | It would be helpful if the HPC CIS expressly stated that an HPC doesn't need to have a charitable purpose of advancing health but can have other charitable purposes. | Paragraphs 9 and 10 of the updated HPC CIS address this point. |
| Meeting the description of a 'Health Promotion Charity' | | |
| 4 | It would be helpful if the HPC CIS included the point from the decision in <i>Waubra Foundation v Commissioner of Australian Charities and Not-for-profits Commission</i> [2017] AATA 2424 (<i>Waubra</i>) that HPC is a composite phrase. | Paragraph 11 of the updated HPC CIS states that the description of an HPC is a composite. |
| Institution | | |
| 5 | In relation to the requirement that an HPC must be an 'institution', there is insufficient legal authority for the point that an institution cannot be part of a larger organisation. | We accept that there is no clear legal authority that explicitly states that, to be an 'institution', an organisation cannot be merely a part or branch of a larger organisation. However, HPCs must meet the requirements for registration set out in the <i>Australian Charities and Not-for-profits Commission Act 2012</i> (Cth) |

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| | | <p>(ACNC Act). One of the requirements is that a charity must be an ‘entity’. The relevant definition of ‘entity’ is set out in s 205-5 of the ACNC Act. Paragraph 6 of the updated HPC CIS now describes this requirement, including that ‘entity’ covers groups of legal persons and other things that are treated, in practice, as having a separate legal identity in the way that a legal person does. A section or division or a larger organisation is not treated, in practice, as having a separate legal identity. Therefore, it would not be an ‘entity’ and would not be entitled to registration with the ACNC as a charity.</p> |
| <p>Promoting the prevention or control of diseases</p> | | |
| <p>6</p> | <p>In paragraph 33 of the HPC CIS redraft <i>Healthy Cities Illawarra Inc v Commissioner of Taxation</i> [2006] AATA 522 (<i>Healthy Cities Illawarra</i>) is cited as authority for two statements about the question of whether ‘injury’ is included in the definition of ‘diseases’. This case is now outdated in light of <i>Waubra</i>:</p> <ul style="list-style-type: none"> (a) the term ‘injury’ is now included in the definition of disease as set out in paragraph 25 of the HPC CIS redraft, in the extract from <i>Waubra</i>, citing Butterworths Medical Dictionary. (b) An injury would also meet the definition of disease in the extract from Dorland’s Illustrated Medical Dictionary which is also set out in paragraph 25 of the HPC CIS redraft, in the extract from <i>Waubra</i>. <p>Therefore, paragraph 33 of the CIS should be amended to read: An HPC may have a principal activity of promoting the prevention or the control of injuries, for example spinal injuries.</p> | <p>We do not consider that, by quoting various definitions of ‘disease’, one of which mentions ‘injury’, in its decision, that the Tribunal in <i>Waubra</i> overturned the conclusion of the Tribunal in <i>Healthy Cities Illawarra</i> that ‘injury’ isn’t included in ‘disease’. The Tribunal in <i>Waubra</i> was not required to consider submissions relating to whether ‘injury’ is included in the definition of ‘disease’. Therefore, it did not need to reach a conclusion on that matter. The Tribunal in <i>Healthy Cities Illawarra</i> was required to consider submissions relating to whether ‘injury’ is included in the definition of ‘disease’ and decided that it is not.</p> <p>The Tribunal in <i>Waubra</i> determined that the correct meaning of ‘disease’ is that which applies in s 34-20 of the <i>Income Tax Assessment Act 1997</i> (Cth). In <i>Healthy Cities Illawarra</i> the Tribunal found that s 34-20 does not include ‘injury’, stating that ‘[i]f a disease includes an injury then the separate reference to “injury” is altogether unnecessary, and it is a rule of statutory construction that a statutory provision is not inserted without purpose’ (at [50]).</p> |

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| | | <p>However, we accept that an institution that has a principal activity of promoting the prevention or control of diseases that arise from injuries may be an HPC. Paragraph 35 of the updated HPC CIS covers this point.</p> |
| 7 | <p>The quoted material in paragraph 25 of the HPC CIS, relating to the definition of ‘diseases’ for the purposes of HPC should include a footnote citing <i>Waubra</i>.</p> | <p><i>Waubra</i> is now included in the citation for the quoted material in what is now paragraph 26 of the updated HPC CIS. The citation also notes that the quoted material originally appeared in <i>Comcare v Mooi</i> (1996) 69 FCR 439, [4445] (Drummond J).</p> |
| 8 | <p>It would be helpful to include guidance in the HPC CIS regarding how specific an organisation needs to be about the disease its principal activity addresses.</p> | <p>The updated HPC CIS provides guidance on:</p> <ul style="list-style-type: none"> the kind of evidence that will be needed to demonstrate that an organisation which addresses a condition that health authorities do not yet recognise as a disease has an activity of promoting the prevention or control of disease (paragraphs 30 and 33 of the updated HPC CIS) the difficulty that an organisation will face in demonstrating that its principal activity is to promote the prevention or control of diseases in human beings if it is not clear about the disease or set of symptoms that its promotional activities are focused on (paragraphs 35 and 36 of the updated HPC CIS) |
| 9 | <p>The HPC CIS should make it clear whether both direct activities to prevent and control diseases and indirect activities to prevent and control diseases will be accepted as promoting the prevention or control of diseases.</p> | <p>Paragraph 43 of the updated HPC CIS affirms that the terms ‘promote’, ‘prevention’ and ‘control’ should not be construed narrowly, meaning that there are many activities which may promote the prevention or control of disease, and provides 12 examples, including direct and indirect activities.</p> |

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| | | Paragraph 49 also states that the ACNC accepts that an organisation could be an HPC where its principal activity includes directly preventing, controlling or treating diseases. |
| 10 | It would be helpful if the HPC CIS expressly covers whether fundraising is an accepted activity to promote the prevention or control of diseases in human beings. | Paragraph 43 of the updated HPC CIS demonstrates that the ACNC accepts active fundraising is an activity to promote the prevention or control of diseases in human beings. |
| 11 | Raising public awareness of the prevalence or risk of disease should be included as one of the examples of activities that promote the prevention or control of diseases in the HPC CIS. | Paragraph 43 of the updated HPC CIS now includes 'raising public awareness of the prevalence or risk of disease' in the list of examples. |
| 12 | The HPC CIS states that a rational or plausible link is needed between an activity and a resulting health condition for an activity to be regarded as promoting the prevention or control of that health condition. Should it state rational, plausible and/or causal instead? Including 'plausible' may result in a 'wide bow'. | Paragraph 44 of the updated HPC CIS now states that, although an organisation does not need to prove that its principal activity results in the prevention or the control of diseases in human beings, there must be an evidenced, rational or plausible link. |
| Principal activity | | |
| 13 | The dictionary definition of 'principal' is <i>main, major, primary, key, foremost, fundamental</i> – shouldn't this be the measure of whether an organisation can be registered as a HPC, rather than no other activity being | The method of determining principal activity that is set out at paragraph 51 of the updated HPC CIS is based on the decisions of the Administrative Appeals Tribunal in <i>Waubra</i> and in <i>Healthy Cities Illawarra</i> . The ACNC cannot impose a |

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| | greater than the principal activity? The guidance in the HPC CIS may set a low bar, where an organisation can demonstrate that it undertakes a number of different activities, but the portion of time/resources etc allocated to one activity happens to be more than each individual other activity. | stricter interpretation than the Administrative Appeals Tribunal has accepted is appropriate, unless there is a court decision which states that a stricter interpretation must be applied. |
| 14 | Paragraph 32 is not saying anything that has not already been said in the previous two paragraphs of the HPC CIS redraft and it incorrectly implies that <i>Waubra</i> specifically stipulates that ‘time and resources’ are the (only) relevant measures of an organisation’s main activity. Further, the following paragraph in the HPC CIS redraft (paragraph 33) goes on to stipulate a whole range of factors (other than time and money) that are relevant to take into account when determining the principal activity. Therefore, paragraph 32 of the HPC CIS redraft should be deleted. | The point covered in paragraph 32 of the exposure draft of the updated HPC CIS is now covered in paragraphs 51 and 52. Paragraph 52 explains that the range of factors that can be considered to ascertain an organisation’s principal activity are those that can contribute to determining how the organisation applies its time and resources. |
| 15 | In calculating a charity’s principal activity, the HPC CIS should explain how the ACNC takes into account activities such as fundraising, administration and back-office functions. That is, it should clarify whether these are ignored when determining the principal activity on the basis that they are necessary overheads in order to engage in activities of a charitable nature, rather than activities in their own right. Alternatively, it should clarify whether the better approach would be to explain that the time and expenditure should be apportioned amongst the other activities. | Paragraphs 56 and 57 of the updated HPC CIS now provide an explanation of how administrative functions are to be treated in identifying an organisation’s principal activity. |

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| <p>16</p> | <p>What happens when a charity’s principal activity changes gradually over time – does it self-assess regarding the change? At what stage does it need to approach ACNC or the ATO to confirm the continuing registration?</p> | <p>Paragraph 54 of the updated HPC CIS now states:</p> <p>An HPC which undertakes a range of activities may find over time that one of its activities that is unrelated to promoting the prevention or control of diseases in human beings becomes its principal activity. If this happens, the organisation has a duty to notify the Commissioner that it is no longer entitled to registration with the HPC subtype of charity.</p> |
| <p>Examples</p> | | |
| <p>17</p> | <p>The redraft of the HPC CIS does not include examples of principal activities carried out by ACNC registered HPCs that may be suitable for endorsement as an HPC. Given the CISs are not just used as guidance for ACNC officers but also for professionals assisting the sector, those in the sector and the general public, the examples of principal activities carried out by ACNC registered HPCs is useful.</p> <p>The list contained at paragraph 8 of the current HPC CIS should be included in the updated HPC CIS.</p> | <p>Paragraph 43 of the updated HPC CIS includes 12 examples of the kinds of activities the ACNC accepts promote the prevention or the control of diseases in human beings.</p> <p>We have decided not to include more specific examples of principal activities carried out by organisations the ACNC has previously registered as HPCs in the updated HPC CIS because we decide each application according to the law. An organisation that has a principal activity similar to that of an organisation that we previously registered as an HPC may not be entitled to registration as an HPC, depending on whether it meets the other requirements for registration.</p> |
| <p>18</p> | <p>Example 3 – does the Commissioner see fundraising and administration as separate activities to the principal activity? If this is the case, how is marketing and general promotion expenditure and activities to be treated, which may lead to an enhanced brand profile, attracting more members</p> | <p>The point of example 3 is to make it clear that an HPC can engage in activities unrelated to health promotion, as long as the health promotion activity is the principal activity.</p> |

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| | <p>and funding, to provide more advocacy and direct services to, or on behalf of, the charity’s clients and customers? In small charities, many roles may be combined, but in larger charities, they may be distinct.</p> | <p>However, as this may have caused some confusion, example 3 has been amended so that the time and funds spent on fundraising and administration are not quantified in the example and are described as being undertaken to support all of the activities to achieve its objects.</p> |
| <p>19</p> | <p>Example 4 in the HPC CIS redraft describes a charity promoting road safety and suggests that this charity would not be an HPC. Such a charity would be an HPC.</p> <p>Injury giving rise to disease:</p> <p>(i) It is self-evident that injuries from road traffic accidents can lead to a variety of diseases. The analysis should be based on substance rather than form: just because a charity does not explicitly make the connection between road safety and disease on its website does not mean that its principal activity, as a matter of objective fact and taking a holistic view, is not the prevention and control of disease (via the prevention and control of injuries).</p> <p>(ii) This is an approach consistent with the principle expressed by the High Court in <i>Commissioner of Taxation v Word Investments Ltd</i> as follows:</p> <p>“Similarly, the charitable purposes of the company can be found in a purpose of bringing about the natural and probable consequences of its immediate and expressed purposes, and its charitable activities can be found in the natural and probable consequences of its immediate activities”.</p> | <p>The relevant authorities indicate that, in order for an activity to promote the prevention or control of diseases in human beings, there needs to be more than an implicit relationship between the promotional activity and the intended prevention or control of disease. This is explained in paragraph 47 of the updated HPC CIS, which uses the decision in <i>Krishnamurti Australia Inc and Commissioner of Taxation</i> [20011] AATA 512 as an example. Example 4 in the CIS illustrates this point.</p> |

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| <p>20</p> | <p>It would be helpful if two additional examples could be included in the HPC CIS to deal with:</p> <p>(1) Diseases suffered by women during pregnancy; and</p> <p>(2) Activities aimed at preventing alcohol and drug abuse with attendant disease implications.</p> | <p>Examples 7 and 8 have been added to the updated HPC CIS to address the suggested scenarios.</p> |
| <p>Other</p> | | |
| <p>21</p> | <p>It is important that the ACNC ensures that faith-based healthcare bodies are not precluded from being entitled to registration as HPCs on the basis that they also have a purpose of advancing religion.</p> | <p>A faith-based healthcare body with a purpose of advancing religion and which meets all requirements for registration as a charity would be entitled to registration as an HPC, as long as its activity to promote the prevention or the control of diseases remains its principal activity. This is covered in paragraph 53 of the updated HPC CIS.</p> |
| <p>22</p> | <p>Healthcare specialist bodies receive inconsistent treatment when they apply to be registered as HPCs. Some healthcare specialist bodies are registered as HPCs and some are told that they do not meet the requirements.</p> <p>The HPC CIS should make it clear how the ACNC determines whether healthcare specialist bodies will be entitled to registration as an HPC.</p> | <p>A healthcare specialist body which meets all requirements for registration as a charity and which has a principal activity of promoting the prevention or control of diseases in human beings will be entitled to registration as an HPC.</p> <p>The updated HPC CIS explains the definition of HPC and provides examples of the kinds of activities that are regarded as promoting the prevention or the control of diseases in human beings at paragraph 43.</p> |