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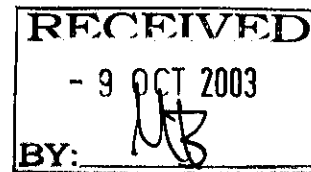
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**Baptist
Community
Services**
NSW & ACT
ABN 90 000 049 525

3rd October 2003

Ms Jane Schwager
Chair
Charities Definition Working Group
The Board of Taxation
Langton Crescent
PARKES ACT 2600



Dear Ms Schwager

Submission on the Definition of a Charity

Baptist Community Services – NSW & ACT ('BCS') is a significant provider of residential care for the aged and disabled in NSW and the ACT. It provides accommodation for over 2,200 people in nursing homes, hostels or independent living units. BCS employs in excess of 2,500 people within its facilities or under its programmes.

BCS also provides other services such as:-

- community based services to persons who are aged or disabled;
- carer respite;
- youth homes;
- childcare centres;
- community centres;
- opportunity shops, and
- counselling services for marriage and family, domestic violence intervention services.

SUMMARY

The following are the concerns, which BCS has with the draft legislation, and which we believe will hinder the workability of the proposed draft legislation:-

1. Codification without recognition of existing common law;
2. Definition of entity;
3. Inclusion of Serious Offence as a Disqualifying Purpose;
4. Definition of a Disqualifying Purpose;
5. Definition of Ancillary or incidental; and

Codification without recognition of existing common law

It is of concern that the draft legislation makes no attempt to recognise or incorporate the past common law. The definition of a charity has its roots in

the Preamble to the Charitable Uses Act 1601. Since then there have been many court decisions which have added much fabric to the definition of a Charity. It is not possible to incorporate all this history into legislation. It is in our view imperative that the legislation does not ignore all this history and understanding of what is the common law understanding of what currently defines a charity. The legislation should require the reader or user to include this common law in their interpretation of the Act. Currently, this is not adequately provided for and as such may result in a completely inappropriate interpretation of the definition than is presently understood as the definition of a charity. It is important that the ATO and the courts are not left with just the "black letter" definition of charity when this legislation is passed and becomes law.

BCS requests that the draft incorporate a preamble which recognizes this past history and definition for the reader and user of the legislation in their understanding of the legislation. This could be done by incorporating the following clause in the Act *"The rules of equity and of common law applicable to the definition of a charity shall continue in force except so far as they are inconsistent with the express provisions of this Act."*

Definition of Entity

It is of concern that the draft legislation does not accurately recognise all present charities under this draft legislation. While BCS is a limited guarantee company under the Corporations Act BCS acknowledges that not all existing charities have used that corporate structure.

BCS believes the legislation should have its own definition of entity. We believe it is inappropriate to refer the definition of an entity to the definition of entity in another Act. The Income Tax Assessment Act 1997 is an Act which has a specific purpose and that does not necessarily correspond with the purposes of this draft legislation. As one of the purposes of this draft legislation is to provide a definition for use in both Commonwealth and State legislation it is important this legislation is self-contained with its own definitions. For instance for valid reasons, the definition of an entity in terms of the Income Tax Assessment Act 1997 may need to be changed but this change could unintentionally adversely impact upon charities.

Inclusion of Serious Offence

It is of concern that the legislation includes such a clause. The Report of the Inquiry into the Definition of Charity did not discuss the inclusion of this idea.

The impact of the inclusion of this offence is to penalise the entity twice for the same offence. This is against the principals of our justice system. If an entity is guilty of a serious offence it will have been convicted and penalised under the relevant Act that was breached. Now this draft legislation proposes that the entity will be penalised a second time under this legislation. The penalty under this legislation is a form a corporate capital punishment or death sentence i.e. the charity will no longer be a charity and can never be reinstated. There is no graduation of the offence nor is there ever the possibility of reinstatement as a charity. For BCS, which manages multiple facilities, a finding of guilt at one site would in fact make all sites guilty. The practical consequence of such a finding for BCS will be to immediately place in jeopardy the 2,500 jobs, the many thousands of residents and clients that are cared for by BCS on a daily basis. The present directors of BCS who act in an honorary capacity would need to seek immediate protection of the Corporations Act in such circumstances. Is this really the intention of the policy makers?

Definition of a Disqualifying Purpose

It is of concern that the present definition of a disqualifying purpose is inappropriate. It is and has been a valid activity of charities to advocate a political cause or change of law or government policy. In fact many past Governments have actively sought the opinion of charities for the very purpose of changing the law or government policy for the better. However, this proposed definition would expose charities to being denied classification as a charity by participating in such activities even at the invitation of the Government.

BCS would accept the following wording for clause 8(2) of the draft legislation:-

“Any of these purposes is a disqualifying purposes:

- (a) The purpose of advocating directly a political party; or*
- (b) The purpose of supporting a candidate for political office;*

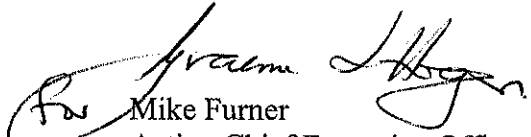
If it is, either on its own or when taken together with one or both of the other of these purposes, more than ancillary or incidental to the other purposes of the entity concerned.”

Definition of Ancillary or Incidental

The draft legislation refers to ancillary or incidental in a number of clauses, however they are defined. In particular the definition of “Dominant Purpose” and “Disqualifying Purposes” which are crucial clauses of the draft legislation both use these words. It may be by incorporating the clause in regard to the common law of Charities that it will be adequate, however, it would in our

opinion be best if the legislation did include a definition of each word. Failure to include definitions would in our opinion affect the workability of the proposed legislation.

Yours faithfully
Baptist Community Services – NSW & ACT


Mike Furner
Acting Chief Executive Officer