

30 September 2003

Board of Taxation  
Attention: Ms Jane Schwager  
Chair, Charities Definition Working Group  
C/- The Treasury  
Langton Cr  
Parkes ACT 2600

By email: [charitydefinition@taxboard.gov.au](mailto:charitydefinition@taxboard.gov.au)

Dear Ms Schwager,

Thank you for the opportunity to provide comment upon the draft Charities Bill 2003.

Attached is the submission from ACROD Limited to the consultation on the draft Bill. Please contact me on 02 6282 4333 should any questions or need for further information arise.

Yours sincerely

Ken Baker  
Chief Executive  
ACROD

## **SUBMISSION to the Board of Taxation Consultation on the Definition of a Charity 30 September, 2003**

### **ACROD Limited**

ACROD is the national peak body for disability services. Its purpose is to equip and enable its members to develop quality services and life opportunities for Australians with disabilities. ACROD's membership includes 550 non-government, non-profit organisations, which collectively operate several thousand services for Australians with all types of disabilities, including intellectual, physical, psychiatric and sensory. ACROD's members are located in every State and Territory in Australia and range in size from very small to very large — two-thirds of ACROD's organisational members have annual incomes of less than \$500 000.

In seeking to achieve its purpose, ACROD provides a wide range of advice and information to the disability services sector through a monthly newsletter, Newsfaxes, e-mail networks, conferences and seminars. Its consultative structures include a system of issues-based National Committees and State Sub-Committees, forums and interest groups that operate by correspondence/email, teleconferences and face-to-face meetings. ACROD's submissions to government are developed in consultation with members.

ACROD also provides advice to governments on public policy, with a view to ensuring that it responds to the needs of people with disabilities. ACROD works with government on all significant disability matters. It is currently represented on more than 20 Commonwealth Government (or quasi-Government) reference groups, working parties and advisory groups, and on numerous State and Territory committees.

ACROD has a National Secretariat in Canberra and offices in every State and Territory that focus on State issues in disability. The organisation as a whole is governed by a national Board which includes the elected Chair from each State/Territory Division as well as representatives elected directly by members.

ACROD welcomes the opportunity to comment on the draft Charities Bill 2003 (the draft Bill). It considers itself and most of its members to be charities under

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the Common Law. ACROD understands that the draft Bill is intended to codify existing Common Law so as to provide certainty to charitable institutions and the community. ACROD is pleased to contribute to this process by providing its comments and recommendations regarding:

- the workability of the definition of a charity in the draft Bill;
- whether the public benefit test in the exposure draft should also require the dominant purpose of a charitable entity to be 'altruistic'.

### **Section 4(1)(e) - Core Definition – Serious offences**

While neither government, ACROD nor the community at large would wish to condone or support engagement in serious offences, a number of concerns about the place of this in charities definition legislation arise.

Section 3(1) defines a serious offence as an offence against a law of the Commonwealth, a State or a Territory that may be dealt with as an indictable offence. Such an offence may arise as a consequence of the commission (or omission) of an act by an organisation's employee(s) or other agent(s). It may involve laws relating to a broad range of areas, including occupational health and safety or environmental protection. The draft Bill would seem automatically and permanently to exclude from the definition of a charity any organisation so implicated in a serious offence.

Because laws already exist that specify sanctions for serious offences – sanctions that are weighted to reflect the gravity of the offence and responsibility for the offence - ACROD contends that this is not an appropriate role for charities legislation.

Should it be the intention of the draft Bill to reduce the risk of charities committing fraud or other serious offences, then this could be achieved by provision for revoking (permanently or temporarily) the endorsement of an organisation as an Income Tax Exempt Charity through relevant taxation law.

*It is recommended that Section 4(1)(e) of the draft Bill be removed.*

### **Section 4 – Not-for-profit entities**

The core definition in section 4(1) of the draft Bill refers to an entity that is a not-for-profit entity. Entity is defined under Section 3(1) as having the meaning given by section 960-100 of the Income Tax Assessment Act 1997. This leads to a situation whereby dominant purposes (section 6), public benefit (section 7) and disqualifying purposes (section 8) would all be assessed with reference to the legal entity and not the broader concept of the institution, group or cause.

There are good reasons for why a charitable group may be required to create a separate legal entity: it could be for contractual reasons, for other legal

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reasons, or for protection of assets of the group. That entity, *viewed in isolation*, may be seen as conducting activities that do not support a charitable purpose as defined by section 10 of the draft Bill. An entity so affected may include one established to provide fundraising, corporate, insurance, investment or treasury services for a charitable group.

Peak bodies or federations supporting state-based charities may be constituted as entities separate from their member organisations, and may undertake activities that, when viewed in isolation, are considered not to support a charitable purpose.

ACROD's view is that, for peak and other co-ordinating bodies, the same consideration should apply to charity definition as is made under paragraph 65 of Taxation Ruling TR 2003/5 in relation to Public Benevolent Institutions.

A distinction between activities and purposes should be made. The activities of an organisation that further a dominant purpose that is charitable - even though that dominant purpose attaches to the broader group in which, or for which, the entity exists - should qualify the entity as charitable under section 4(1)(c) of the draft Bill.

*It is recommended that sections 4(1)(b) & 4(1)(c) of the draft Bill be amended to clarify that the dominant (charitable) purposes of an entity can include those charitable purposes of organisations with which the entity is affiliated, or is in support of, in conducting its principal activities.*

### **Section 5(a) & 5(b) – Gain or profit; distribution of profits or assets**

Individuals, including some who are employees or members of a charitable institution, may be entitled to remuneration or other payments for goods or services provided at arm's length. Such arm's length benefits should be excluded from the profits or gains outlined in section 5(a) of the draft Bill.

The Bill should also recognise that the distribution of profits or assets to members may be appropriate under certain circumstances, such as those where:

1. Members are also beneficiaries of the charity. It is common practice for individuals with particular disabilities to be both recipients of services and members of charitable institutions that provide services to people with a disability. Provided those members do not receive such services (or benefits) as a result of their membership and in their capacity as members, the receipt of the benefits should not cause the entity to fail the test as a not-for-profit entity.
2. Individuals are members of self-help groups and also receive benefit from participation in these groups.

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3. Members are in themselves charities, as may be the case for peak bodies or other co-ordinating bodies.

*It is recommended that sections 5(c), 5(d) and 5(e) of the draft Bill be amended as follows:*

*"5(c) - Nothing in this section shall preclude an entity that makes payments for goods or services to members (who may be individuals or entities) from being not-for-profit, provided that those payments are made in the normal course of business".*

*"5(d) – Nothing in this section shall preclude an entity that may distribute its profits or assets to members or other organisations that are also charities, from being a not-for-profit entity".*

*"5(e) - Nothing in this section shall preclude an entity that distributes its profits or assets to members that the charity is intended to benefit in accordance with its charitable purposes, from being a not-for-profit entity".*

### **Section 6(1) – Dominant purposes; further, aid, ancillary or incidental**

A liberal interpretation of those activities or purposes that may be considered as furthering, in aid of, ancillary or incidental to dominant purposes is necessary in order that the draft Bill may meet current community expectations of the definition of charity. Dominant purposes in the charitable sector are, and should continue to be, defined by their expected outcomes, measured in the draft Bill as charitable or otherwise by reference to section 10(1).

ACROD believes that the extent to which other purposes or activities may be acceptable within the core definition under section 4(1) of the draft Bill should be determined by whether they further, or are in aid of, the dominant purpose(s), and not by some financial or other quantitative measure. Further to this, other purposes or activities that are incidental or ancillary should not disqualify an entity as charitable, as the core definition relates to "dominant purpose(s)", not sole purposes.

*It is recommended that clause 4(1)(c) of the draft Bill be removed, and that clause 6(1)(b) of the draft Bill be amended to read, "any other purposes that it has are purposes that further or are in aid of, or are ancillary or incidental to, its purposes that are charitable.*

### **Section 4(2)(a), Section 7 - Altruism & Public Benefit**

ACROD broadly accepts the Board's characterisation of 'altruism' as voluntarily assumed obligation towards the wellbeing of others or the community generally. However, ACROD is concerned that a requirement for the dominant purpose of a charity to be altruistic may require those applying

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the charity definition legislation to assess the motivations of the people directing or managing a charitable organisation. These assessments are likely to be subjective and inconsistently applied. It is unclear how a requirement that a purpose be altruistic would assist the administration of laws affecting charities more than relying solely on an objective analysis guided by section 10(1) of the draft Bill (regarding charitable purposes).

ACROD is also concerned that public benefit, as limited by section 7(2) of the draft Bill, excludes purposes that benefit groups that are numerically negligible. Many disability services operate for the very reason that the numbers of people with a specific type of disability are low and services provided by governments or other charitable institutions are unavailable, unsuitable or insufficient.

*It is recommended that altruism not be a requirement of a charitable institution in order to satisfy the public benefit test under section 7 of the draft Bill.*

*It is further recommended that clause 7(2) of the draft Bill be removed.*

## **Section 9 - Self-help Groups**

With the exception of that outlined in the following paragraph, the requirements of self-help groups seem an accurate reflection of their operation. However, many organisations in the disability sector were initially formed, and continue to be conducted, by parties with a personal interest in a particular disability. Such interested persons may include people with disabilities, their family members or their friends. ACROD strongly contends that such organisations are charitable; however, the interpretation of altruism as requiring obligation towards the wellbeing of others risks disqualifying such organisations. This further supports the recommendation above, that altruism not be a requirement for charities.

Section 9(b) of the draft Bill refers to a purpose of assisting individuals affected by a need that is not being met. This requirement seems unnecessary and inconsistent with the broad expectation that services be made available to people with disabilities not just in response to unmet need but also to provide them with choice.

*It is recommended that the words, “or by a need that is not being met”, be removed section 9(b) of the draft Bill.*

## **Section 8(1) – Unlawful purposes**

While in some cases it may be evident that an organisation’s purpose is unlawful, in other cases, it may be difficult to determine unlawful purpose or intent, without reference to, and testing by, the courts of the activities of persons representing the organisation. Section 8(1) of the draft Bill could lead to a position where an organisation fails the core definition under section 4(d)

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by virtue of an unlawful *purpose* or *intent*, but without having committed any unlawful act and without having been found guilty of any offence. As argued above, the laws relevant to the unlawful acts or purposes referred to - and not charities legislation – should be relied upon in dealing with any offence.

*It is recommended that section 8(1) of the draft Bill be removed.*

### **Section 8(2) – Other disqualifying purposes**

Further to the discussion above regarding dominant purposes, and what may be considered as ancillary or incidental, it is of some concern that the draft Bill makes specific reference to advocacy activities.

An important distinction between advocating a political party and advocating a cause needs to be drawn. It is legitimate for the draft Bill to prevent advocacy for a political party being treated as charitable, but the advocacy of causes has long been, and should continue to be, an important role for the Australian charitable sector. Such advocacy is an important element of providing advice on social policy issues to governments and the quality of public debate and public policy broadly benefits from such advocacy.

*It is recommended that section 8(2)(a) of the draft Bill be amended to remove the words “or cause”, that section 8(c) of the draft Bill be removed.*

### **Section 10(1) – Charitable purposes**

While an inference is made to the application of section 10(1)(a) of the draft Bill (charitable purposes including the advancement of health) to the advancement of services to disability, no specific reference is made to disability in section 10(1) or the explanatory material. Disability includes, but is not limited to intellectual, physical, psychiatric and sensory disability, and should be specifically included under section 10(1) for the purpose of clarification.

*It is recommended that section 10(1)(a) of the draft Bill be amended to read, “the advancement of health, including support of people with disabilities”.*

### **Charities Commission**

As a body with the primary object of collecting revenue, the Australian Taxation Office is not the appropriate body to carry the main responsibility for the interpretation of charity definition and its application to tax laws. ACROD supports the formation of an independent body to perform this function.

*The establishment of an independent statutory body for the administration of charities is recommended.*

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ACROD appreciates the work of the Board of Taxation in undertaking consultation processes over recent months and wishes the Board well in its deliberations and subsequent report to the Federal Treasurer.

Ken Baker  
Chief Executive  
ACROD Limited

30 September, 2003