



Aged & Community Services
Association of NSW & ACT

**SUBMISSION TO THE
BOARD OF TAXATION'S CONSULTATION
ON THE DEFINITION OF A CHARITY**

Aged & Community Services Association of NSW & ACT

29 September 2003

SUMMARY

The Aged and Community Services Association of NSW & ACT Inc (ACS) supports the intent of the draft *Charities Bill*, released by the Federal Treasurer in response to the report of the Charities Definition Inquiry.¹ ACS believes the Bill would clarify the definition of a charity in a number of positive ways.

ACS also supports the inclusion in Clause 4 of the Bill of an amendment to indicate that the dominant purpose of a charity should be altruistic.

However, ACS seeks changes to some key areas of the draft Bill, including:

- removal of advocacy for change in government policies as a disqualifying purpose;
- clarification of the meaning of a “government body”, to ensure public funding or government regulation does not exclude some organisations from the definition of a charity;
- clarification of the definition of the public benefit test to ensure some charities that provide retirement villages are not excluded from the definition of a charity; and
- clarification that the “advancement of social and community welfare” includes assisting people (including older people and people with disabilities) who are disadvantaged in access to housing.

ACS also believes the Federal Government should reform and clarify the definition of a Public Benevolent Institution (PBI), as recommended in the Charities Definition Inquiry.

ACS PROFILE

ACS NSW & ACT is the peak organisation for aged and community care providers in the non-profit, church and charitable sector. ACS also provides services for those for-profit organisations that join our Industry Advice Scheme. ACS is a member of the Aged and Community Services Australia (ACSA) Federation.

As at 1 July 2003, ACS has 295 member organisations which manage 671 residential care facilities, 377 retirement villages and 350 community care services. The services provided by our members include:

- 10,840 Residential High Care (Nursing Home) places
- 20,000 Residential Low Care (Hostel) places
- 14,002 Self Care units
- 6,445 Community Aged Care Packages.

ACS is a registered charity and a PBI.

ADVOCACY (Clause 8)

ACS shares the concerns of many other charitable bodies at the inclusion in Clause 8 of the draft *Charities Bill* of the following as disqualifying purposes:

¹ Charities Definition Inquiry (2001) *Report of the Inquiry into the Definition of Charities and Related Organisations*, Canberra.

- “the purpose of advocating a ... cause”
- “the purpose of attempting to change the law or government policy”.

ACS welcomes the Federal Treasurer’s public statement that “a charity is someone who engages in helping the poor or the sick and in the course of that they are entitled to criticise the government as they currently are and they would be if this statute were passed.”² ACS notes that the draft Bill makes it clear that these are only disqualifying purposes if they are “more than ancillary or incidental to the other purposes of the entity concerned.”

ACS also supports the inclusion of support for a political party or candidate as a disqualifying purpose.

However, ACS believes that the current wording could be prejudicial to the Treasurer’s avowed intent. Firstly, a number of charities work primarily through advocacy to improve the circumstances of particular disadvantaged groups. Some of these would currently be denied PBI status, but they are currently recognised as charities. ACS believes these organisations stand to lose their charitable status under the draft Bill.

Secondly, charitable aged and community care providers regularly seek to have government policies changed, both indirectly through their peak organisations such as ACS and directly through representation to MPs, government departments and the broader community. This is an essential component of our work with older people, people with disabilities and their carers, both to improve the circumstances of our clients and to respond to, or recommend changes to, government initiatives that affect our industry. The wording of Clause 8 raises the prospect that the Australian Taxation Office (ATO) could commence audits of the amount of time or money spent on such advocacy, as occurs in some overseas jurisdictions such as the United States, Canada and the United Kingdom.³ ACS believes this would be highly counterproductive.

On balance, ACS believes it would be better if the Draft Bill were revised to clarify that public advocacy is permissible and supports the recommendation by ACOSS to this effect.⁴

Recommendation 1

That Clause 8 of the Draft Bill be replaced by a provision along the following lines:

“A charity may have public advocacy purposes (which could be described in the explanatory material as including “attempts to change the law or government policy”) provided those purposes:

- (1) further, or aid, or are ancillary or incidental to, its dominant charitable purpose or purposes; and***
- (2) do not promote a political party or a candidate for political office, unless such purposes are ancillary or incidental to its dominant charitable purpose or purposes.”***

² Quoted in L. Tingle & A. Day (2003) Charities clash with Costello, *Australian Financial Review*, 31 July, p.3.

³ ACS notes that a recent review of charity law in the United Kingdom, accepted by the Government, has recommended that charities be given greater freedom to campaign – see Home Office (2003) *Charities and not for profits – a modern legal framework*.

⁴ ACOSS (2003) A charity by any other name - submission to the Board of Taxation.

GOVERNMENT BODY (Clause 4)

ACS is concerned that the meaning of a “government body” in Clause 4 (1) (f) is potentially unclear. ACS acknowledges that the draft *Explanatory Material* (paragraph 1.19) states that “Government funding and/or regulation will not, generally, of itself, be considered sufficient to establish that an entity is controlled by the government.” However, ACS is concerned that (paragraph 1.20) leaves open the possibility that “both government funding and government regulation may be considered to be factors that are relevant in determining the existence of government control.”

This issue is of major concern to not-for-profit, charitable aged care providers, as residential aged care is one of the most regulated industries in Australia. Residential care providers are funded on average for 70% of their total revenue by the Federal Government, with the charges they can levy on residents for the balance tightly regulated. Most other aspects of the operation of aged care facilities are similarly regulated through over 1,000 pages of the *Commonwealth Aged Care Act* and a raft of other Federal and State legislation. On the face of it, all charitable aged care providers could unfairly and inappropriately be deemed to be government bodies.

ACS believes that the *Explanatory Material* must clearly state that government funding and regulation alone **do not** imply that an organisation is a government body.

Recommendation 2

That the Explanatory Material on Clause 4 clearly state that government funding and regulation alone do not imply that an organisation is a government body.

PUBLIC BENEFIT (Clause 7)

Some ACS members have experienced difficulties in obtaining PBI status from the ATO on the grounds that they are providing proportionately too much retirement village accommodation at high market value and not enough residential aged care or housing for disadvantaged people. This is despite these organisations showing that they cross-subsidise from their retirement village operations to their other aged care operations.

ACS is concerned that the definition of “public benefit” in Clause 7 (2), stating that “a purpose is not directed to the benefit of a sufficient section of the general community if the people to whose benefit it is directed are numerically negligible”, could result in a similar problem. ACS believes that, based on experience to date, the ATO could challenge the charitable status of some organisations on this ground.

ACS contends that the *Explanatory Material* must clearly state that the public benefit test must take account of all the operations of the organisation in determining whether the number of beneficiaries is numerically negligible.

Recommendation 3

That the Explanatory Material on Clause 7 clearly state that the public benefit test must take account of all the operations of the organisation in determining whether the number of beneficiaries is “numerically negligible”.

CHARITABLE PURPOSES (Clause 10)

ACS welcomes the expanded definition of charitable purposes in the draft Bill, especially the inclusion of “advancement of social and community welfare”. We suggest that an additional category of assistance with housing and/or accommodation support for people with special needs, including older people and people with disabilities, should be added in the *Explanatory Material*. This would also assist in addressing our concern about the charitable status of ACS members providing retirement village accommodation.

Recommendation 4

That the Explanatory Material should make it clear that the “advancement of social and community welfare” in Clause 10 includes “the provision of housing and/or accommodation support for people with special needs, including older people and people with disabilities, or who are otherwise disadvantaged in their access to housing”.

FURTHER REFORM

ACS is disappointed that the Federal Government has not chosen to act on the Charity Definition Inquiry’s recommendation to reform the definition of a Public Benevolent Institution. The Inquiry recommended that a new category of a Benevolent Charity be established, being a charity whose dominant purpose is to benefit, directly or indirectly, those whose disadvantage prevents them from meeting their needs.

While ACS welcomes the recent ATO ruling on PBI status⁵ as it clarifies the existing approach of the ATO, we believe the Board of Taxation should recommend to the Government that it modernise the definition of PBI in line with the Charities Definition Inquiry recommendations.

ACS also believes the Government should consider the Inquiry’s other key administrative recommendation, that an independent body, such as a Charities Commission, be established as gatekeeper of charitable status separate from the ATO. This will minimise any conflicts of interest for the ATO in making such decisions.

Recommendation 5

That the Board of Taxation recommends to the Government modernisation of the definition of a Public Benevolent Institution and consideration of establishment of an independent body to be the gatekeeper of charitable status.

OTHER MATTERS

You have sought other information to assist the Board frame its recommendations to government. ACS's responses are as follows:

⁵ Australian Taxation Office, *Income tax and fringe benefits tax: public benevolent institutions*, Taxation Ruling TR2003/5.

ACS is a Public Benevolent Institution and is registered as a Deductible Gift Recipient. We are an Income Tax Exempt Charity. We do not believe our status would change as a result of the draft Bill.

It is unclear whether any additional administrative burden or compliance costs would be incurred since administrative procedures have not been communicated. If any quantification of 'dominant purpose' or 'ancillary' were to be required in the future this would impose a significant compliance burden, on ACS and on our members.

With the modifications suggested elsewhere in our submission, the proposed definition of a charity would seem to be reasonably well able to adapt to the changing needs of society.

Strengthening the dominant purpose to include altruism would not on the face of it affect ACS.