14 May 2004

Jane Schwager
Consultation on the Definition of a Charity
The Board of Taxation
C/- The Treasury
Langton Crescent
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30 Sept 2003

Dear Ms Schwager

Arts Law Submission on the Charities Bill 2003

The Arts Law Centre (Arts Law) of Australia welcomes the opportunity to provide a submission to the Federal Government's consultation, by the Board of Taxation, on the draft *Charities Bill* (draft Bill). This is an opportunity for the Government to enhance the clarity and consistency of the definition of charity and to improve the efficiency of the charitable sector through simplifying the current legal and administrative regimes in place. In view of the enormous role the charitable sector plays in the delivery of community and cultural services across Australia, such reforms have the potential to improve the sector's efficacy, and in the process widely benefit all Australians.

Arts Law is the national community legal centre for the arts. It has a very wide brief: to give legal advice and referral services to individual artists and arts organisations in all sectors of the arts on all legal issues which affect their professional lives, across Australia. Arts Law is a company limited by guarantee. It is recognized by the ATO as both a charity and a Deductible Gift Recipient. Arts Law was incorporated in 1983 and now has 7 full-time staff, a national panel of nearly 200 volunteer lawyers and about 1500 subscribers. In addition it is currently recruiting 2 new Indigenous staff for its Indigenous Project.

Whilst the core business of Arts Law is the provision of legal advice, information and education to arts practitioners (including writers, visual artists, performers, composers, filmmakers, new media practitioners), advocacy is also an important component of the work of Arts Law. Our advocacy work includes making written and oral submissions to government, and working in partnership with other arts organisations to effect change. A couple of examples include the work Arts Law did together with other organisations when the introduction of moral rights legislation was being considered, and the current work with the ATO on a public ruling as to what it means to be carrying on a professional arts business under the *Income Tax and Assessment Act*.

1. General Comments

Arts Law broadly supports the codification of the definition of charity in that it will modernise the law taking into consideration current socio-economic conditions and provide greater certainty and clarity to charities.

Arts Law has concerns that the draft Bill goes beyond the stated purpose of codifying the definition of charity into the realm of regulating the activities of charities. This is of greatest concern in relation to clause 8(2)(c) which includes the purpose of attempting to change the law or government policy as a disqualifying purpose for the purposes of charitable status. This is discussed in more detail below.

Arts Law finds that the treatment in the draft Bill of "purposes" and "activities" in defining charitable status to be confusing. It is not clear when and how the entity's activities may be used to infer its purposes. The approach taken by the Report of the Charities Definition Inquiry is to be preferred.

2. Inclusion of Culture in the draft Bill

Arts Law welcomes the specific inclusion of the advancement of culture as a charitable purpose in the Bill and notes that this provides clarity and transparency for the cultural sector. It may however be useful to define culture in the legislation rather than leaving it the courts to define at some stage in the future. This would provide additional certainty and clarity. However further consultation with the cultural sector would be needed on any such definition.

3. Disqualifying Purpose

Arts Law has significant concerns about the inclusion of section 8(2) in the draft Bill which exclude from charitable status organisations that have among their purposes that of

(a) "advocating a political party ***or cause"***
(b)..
(c)attempting to change the law of government or policy"
unless these purposes are no more than ancillary or incidental to the other purposes of the organisation.

A liberal interpretation of this section would be consistent with the Charity Definition Inquiry's recommendation that the advocacy work "on behalf of those the charity seeks to assist, or lobbying for changes in law or policy that have direct effects on the charity's dominant purpose, are consistent with furthering a charity's dominant purpose". However if this is the correct interpretation then it is superfluous as the draft Bill at section 4 already states that a charity should not engage in activities that do not further or are not in aid of its dominant purpose.

On the other hand, a restrictive interpretation of this section would have a detrimental effect on the (hitherto legitimate) activities of charities, potentially limiting their capacity to inform Government and be consulted by Government. It is likely to be unworkable for many charities, potentially requiring time-consuming regulation of their advocacy work either through self-regulation or regulation by an external body, such as the ATO. In the worst case scenario some charities, particularly peak bodies,

which play an important advocacy role, could lose their charitable status. A better approach is to recognise that some charities may engage in advocacy that is part of their work in promoting the underlying dominant purpose of the charity as recommended by Charity Definition Inquiry.

We note in this regard that a number of charities in the cultural sector are often funded and/or expected by Government funders to provide leadership on law and policy issues that arise and that Governments in fact prefer to deal with peak organisations in consulting with the community on law reform issues, rather than dealing with a huge number of individuals and small organisations.

4. Definition of Government Bodies

A further major area of concern is in relation to the exclusion of government bodies from charitable status. In the current Bill government body means:

(a) the Commonwealth, a State or a Territory; or
(b) a body controlled by the Commonwealth, a State or a Territory; or
(c) the government of a foreign country; or
(d) a body controlled by the government of a foreign country.

Arts Law supports the inclusion of subsections (a), (c) and (d), however we are uncertain of the implications of sub section (b) ie bodies controlled by the Commonwealth, a State or a Territory.

As pointed out in the submission of the Australia Council there are many major cultural institutions supported by the Commonwealth which have government appointments to their board. In addition we note that other organisations may receive a mixture of government funding as well as having Board appointments from State or local government.

The definition of government control appears to be widening and in this regard we note the decision of the Victorian Supreme Court in *Central Bayside Division of General Practice Ltd v Commissioner of State Revenue* No 8719 of 2002 where the court adopted a much looser test of "control by Government". The draft Bill should be clarified to make it clear that the fact that an entity receives government funding, or is established under a government funding program, or has a member of government on its Board/management committee, does not imply that it is a government body. To be a government body the government should have the power to completely control the activities.

5. Criminal Activities

Arts Law has concerns about the workability of section 4(1)(e) which states that an entity shall not be a charity if it engages in, or has engaged in, conduct that constitutes a serious offence. "Serious offence" is defined in section 3 as "an offence against a law of the Commonwealth, of a State or of a Territory, that may be dealt with as an indictable offence." We note that what comprises an indictable offence differs between jurisdictions and in the Federal jurisdiction includes all offences punishable by more than 12 months imprisonment. We note that a great many offences are punishable by more than 12 months imprisonment.

If the provision is enacted in its current form then potentially many charities may lose their charitable status even if no conviction was ever made. This provision has the potential to penalise the community which benefits from the activities of the charity rather than the individuals responsible for the criminal activity.

The requirement in section 4(1)(e) is not a requirement of the common law for charitable status. The common law position is that an unlawful purpose could not be charitable. The distinction is that a charity should never have an unlawful purpose rather than that a charity never have committed a serious offence. The commitment of an offence is an activity rather than a purpose of the entity.

6. Charities, Public Benevolent Institutions(PBIs) and Deductible Gift Recipients(DGRs)

Arts Law agrees with the submissions of ACOSS and others in the community legal centre sector that there is a lot of confusion and misunderstanding, by those in the wider community as well as charities themselves, as to the differences between charities, PBIs and DGRs. This in turn leads to confusion as to what tax relief an entity is enititled under each category. Endorsement by the ATO for each of these categories requires significant work by an organisation and is becoming increasingly problematic working with definitions, particularly of PBIs, which are very outdated. This appears to be a lost opportunity to simplify the law particularly in relation to Public Benevolent Institutions and we urge the Government to examine the need to bring greater clarity and efficiency to the law in this regard.

Yours Sincerely

Robyn Ayres
Executive Director