

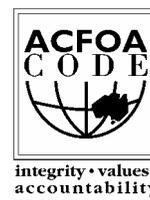


AUSTRALIAN COUNCIL
FOR OVERSEAS AID

**Submission
to the Board of Taxation
on the**

DRAFT CHARITIES BILL

September 2003



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1 INTRODUCTION

The Australian Council for Overseas Aid (ACFOA) welcomes the Australian government's attempt to provide greater clarity, certainty, transparency and flexibility in the definition of an Australian charitable organisation. Legislating a definition of charity and charitable purpose should see a reduction in the inconsistency of application and interpretation of these terms. The clarification of the attributes that constitute a charitable organisation will encourage clear and consistent treatment of these organisations in their dealings with government and its agencies.

The draft definition, while providing clarity and certainty regarding a number of core requirements for charitable organisations, fails to address major recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations (2001)*. The draft Bill attempts to legislate a definition which does not reflect key characteristics of today's charity or the role and scope of the work that they are required to undertake.

In a political climate that is viewed as increasingly hostile towards Australian charities, the transparency of political agendas is critical to the workability of this Draft Bill. ACFOA is concerned to ensure that the Bill achieves the stated purposes of workability and flexibility and offers fair, consistent and transparent treatment of genuine Australian charities.

The importance of the work of charities has grown steadily over past decades. This has happened in the context of a world which has been characterised by rapid, complex and often unpredictable political, institutional, environmental, demographic, social and economic changes. Charities are more than just service providers of aid to the disadvantaged. Charities are also agents for economic and social change for more sustainable development outcomes.

ACFOA urges the government to revise the draft Charities Bill to create a modern charity law. The Bill should recognise that lobbying and advocacy to improve or change government policies does contribute to charitable purposes as well as to better informed and effective government policies. This is demonstrated by case studies included in this submission.

The same rules that apply to other activities of charities should apply to advocacy. The advocacy role of charities should not be singled out for special attention as a cause of disqualification if these activities are furthering the dominant charitable purpose of the organisation.

Proceeding with the draft Charities Bill in its current form would be a missed opportunity by the government to implement modern charity legislation. The Australian government's new Charities Bill should not simply codify past decisions that reflect outmoded ways of operating. Today's charities seek to address the symptoms and causes of disadvantage as well as the results, and in many cases this involves advocacy work. The Tax Board should recognise the move to more effective ways of operating, and ensure that this is reflected in a progressive Charities Bill.

1.1 Who is ACFOA and what is its role in the charities sector?

ACFOA is the national peak body representing Australian-based non-government overseas aid organisations. Its membership includes 80 organisations, most of which are registered as charities and as Deductible Gift Recipients (DGRs) under the Overseas Aid Gift Deduction Scheme. Australian-based overseas aid organisations raised more than \$358 million last year in donations and related income from the Australian public, which represents more than 60 per cent of their annual income. Our research tells us that around 715,000 Australians donate money to regular supporter programs run by these agencies, and 1.67 million Australians were involved in the last year in supporting a fundraiser or event, or gave a one-off donation. More than 40,000 Australians also volunteer their time and skills to the work of overseas aid organisations.

Approximately 50 non-government overseas aid organisations, most of which are members of ACFOA, are also accredited with AusAID and collectively manage about \$85 million per year of Australian Commonwealth funds for overseas aid and development programs. The Australian government recognises that Australian NGOs have expertise and experience in different forms of aid delivery, often using their strong links in developing countries to effectively engage local communities and make a practical contribution to quality aid outcomes. (*Working with Australian NGOs – An Australian Aid Program Policy Paper, August 1997*).

The common purpose of ACFOA and its members is to promote sustainable development and the eradication of poverty worldwide. ACFOA assists the work of member organisations by fostering cooperation and coordination in aid programs, promoting good practice through a well respected Code of Conduct and training programs. ACFOA also represents the views of non-government organisations to government on policy issues.

This ACFOA submission on the draft Charities Bill represents the collective views of ACFOA members. ACFOA would like to acknowledge the considerable input of our member agencies and the work of ACFOA staff and volunteers who assisted in the compilation of this submission.

2 SUMMARY OF RECOMMENDATIONS

Core Definition

Recommendation 1

Clause 4 (1) (c) should be written in the positive, not negative. Wording similar to: 'engages in activities that further, or are in aid of its dominant purpose'

Recommendation 2

Clause 4 (1) (e) be deleted. Unlawful conduct issues should be dealt with under more relevant legislation and by more appropriate bodies than the Australian Tax Office.

Public Benefit

Recommendation 3

That *Clause 7 (2)* provide more clarity on what constitutes a 'numerically negligible' section of the general community.

Recommendation 4

That altruism not be included as part of the test of public benefit.

Disqualifying Purposes

Recommendation 5

That *Clause 8 – Disqualifying Purposes* be replaced with wording similar to the following:

Either of these purposes is a disqualifying purpose:

- a) the purpose of advocating a political party
- b) the purpose of supporting a candidate for political office

Ongoing Reform

Recommendation 6

That the government revisit the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* and

- a) establish an independent administrative body (Charities Commission) to oversee the regulation and ongoing integrity of the charities sector;
- b) modernise the legislative definition of Public Benevolent Institutions; and
- c) work with the states and territories towards a nationally consistent definitional framework for charities.

3 CORE DEFINITION

The core definition described in Clause 4 of the draft Bill is generally supported by ACFOA. Although the definition provides clarity in the majority of areas, ACFOA recommends amendments to the following sub-clauses to make the definition more workable, transparent and flexible.

3.1 Clause 4 (1) (c)

The majority of the core definition is written in a negative tone. To provide more clarity it should be written in terms of what a charity 'does' and not what it 'does not do'.

Recommendation 1

Clause 4 (1) (c) should be written in the positive, not negative. Wording similar to: 'engages in activities that further, or are in aid of its dominant purpose'

3.2 Clause 4 (1) (e)

Clause 4 (1) (e) states that a charity 'does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence'. The explanatory material to the draft Bill states that a 'serious offence' is an offence against the law of the Commonwealth that may be dealt with as an indictable offence.

Similarly, Clause 8 (1) disqualifies an organisation from being charitable if it engages in activities that are unlawful (defined as illegal in the explanatory material to the draft Bill).

The draft Charities Bill's role is to define the characteristics of a charitable organisation, not to provide a mechanism for determining whether an organisation has committed a serious or unlawful offence. More appropriate legislation is available to determine whether an organisation has committed an offence.

The draft Bill indicates, through the use of the term 'constitutes', that those responsible for administering this legislation, the Australian Tax Office, would have the authority to make a determination on whether a serious or illegal offence has been committed. This is unworkable and inappropriate. The judicial system should be responsible for determining whether the actions of an organisation are in breach of any law of the Australian Commonwealth, states or territories.

This clause also raises the question of whether an organisation found to have committed a serious offence will lose its charitable status permanently.

The purpose and reason for inclusion of this provision is unclear and it adds no value to the core definition. The clause is unworkable, provides no certainty or transparency in its intention and no clarity in how it would be appropriately administered.

Recommendation 2

Clause 4 (1) (e) be deleted. Unlawful conduct issues should be dealt with under more relevant legislation and by more appropriate bodies than the Australian Tax Office.

4 PUBLIC BENEFIT

4.1 Clause 7 (2)

Clarification is requested on what constitutes 'numerically negligible'. The term is vague and somewhat ambiguous. No clarity is provided by the explanatory material to the draft Bill.

Recommendation 3

That Clause 7 (2) provide more clarity on what constitutes a 'numerically negligible' section of the general community.

4.2 Altruism

The *Report of the Inquiry into the Definition of Charities and Related Organisations* defined altruism as 'unselfish concern for the welfare or others' or 'regard for others as a principle for action'.

ACFOA accepts in principle that the concept of altruism is a characteristic of charitable organisations. However it is unclear how it could ever be consistently judged and applied, and is therefore unworkable. Until this lack of clarity is addressed ACFOA sees no benefit in the addition of altruism to the test of public benefit.

Recommendation 4

That altruism not be included as part of the test of public benefit.

5 DISQUALIFYING PURPOSES

5.1 Clause 8 (1)

Clause 8 (1) states that an organisation will be disqualified from being a charity if it engages in activities that are unlawful.

As per our arguments regarding the removal of Clause 4 (1) (e), ACFOA submits that this clause is inappropriate for inclusion in legislation defining a charity. It is more appropriately dealt with in other legislation.

5.2 Clause 8 (2)

Clause 8 (2) states that organisations can be disqualified from being a charity if they undertake activities that 'seek to change the law or government policy' or 'advocate a cause' if they are more than ancillary or incidental to the dominant purpose of the organisation.

This clause raises numerous questions regarding its intention and provides no clarity or certainty for agencies who undertake advocacy activities.

The *Report of the Inquiry into the Definition of Charities and Related Organisations* recommended that 'advocating on behalf of those a charity seeks to assist shouldn't deny charitable status provided they do not promote a political party or a candidate for political office'.

ACFOA argues that advocacy activities should not be restricted as long as they are used to further, or are in aid of, the dominant charitable purposes. The draft Bill fails to recognise or reflect that advocacy is an important, effective and legitimate method of furthering a charitable purpose.

One of the key historic roles of charities has been to support the disadvantaged and speak for those who may not have the means to speak for themselves. The draft Bill seems to be indicating that the voices of the disadvantaged do not need to be heard and that the experience of those that work closely with disadvantage are not of value. If an organisation's goals and objectives are determined to be charitable, the methods by which they achieve them should not be in question, as long as they are not illegal.

The draft Bill does not reflect that systemic change requires change at a range of levels. Research conducted by ACFOA and its member agencies on the effectiveness of the programs they undertake has indicated that poverty alleviation requires an integrated process. This process involves service delivery at the micro level with policy input at the macro level. For example, the delivery of services such as health care, food aid or education is not enough on its own to achieve the objectives of sustainable poverty reduction. Structural and systematic changes are also needed. In fact, they are integral to the effectiveness of programs whose objectives are met through service delivery.

The Treasurer, through the draft Charities Bill, is stating that using advocacy as a key method of achieving an organisational (and charitable) objective (such as the relief of poverty) would disqualify the organisation from being charitable.

Approximately half of ACFOA's 80 members receive funding through the Australian government's aid and development program. These agencies are receiving conflicting messages from the government through the Australian Aid program (AusAID).

AusAID's website lists governance as one of five key themes that guide Australia's aid program:

*Governance: promoting democratic and accountable government and effective public administration.*¹

The Minister for Foreign Affairs, through program objectives and funding agreements, is stating that program objectives should be to 'encourage the development of robust, representative and capable civil society to create demand for good governance'.²

Case studies

NGO involvement in the International Campaign to Ban Landmines (ICBL) represented the key connectors between the affected constituency (mine victims overseas) and the policy makers. The eventual signing of the Ottawa Convention banning landmines was achieved "not just because of activists in the NGO community around the world but because of the broad community support all around the world" (Foreign Affairs Minister Alexander Downer). This critical policy change was directly linked to the dominant purpose of ACFOA member agencies, and in fact to not have engaged in this campaign could have been interpreted as Australian NGOs neglecting their dominant purpose. In 1997 the ICBL won a nobel peace prize.

The platform that Australian NGOs were able to provide for the voices of oppressed people in South Africa and Ethiopia in the eighties and East Timor in the nineties was significant in changing official Australian policy towards the governments of these countries. NGOs hosted many overseas visitors who were able to speak first hand to the Australian government about the situation in their countries, and thus contribute to a change in bilateral relations.

NGOs and representative bodies such as ACFOA are regularly requested to provide input into government policy on a range of issues. A good example of this is the ongoing dialogue ACFOA has conducted with the Australian Army and Defence Force on behalf of its members on the development of a formal policy or doctrine to guide military personnel in their interactions with civilians and humanitarian agencies when overseas. ACFOA has strongly advocated for a better understanding and greater respect for the role of humanitarian agencies to be incorporated into the doctrine and in subsequent military training. The ADF have stated that the involvement of ACFOA in the development of this doctrine has resulted in a much better prepared and professional intervention force being deployed to the Solomon Islands as part of the RAMSI intervention.

¹ www.ausaid.gov.au

² AusAID - Australian Cooperation with Solomon Islands 2003-2006 - NGO Cooperation Agreements Funding Guidelines pg 2

In the current negotiations for NGO-AusAID cooperation agreements for Africa, the AusAID guidelines state:

*A specific priority for AusAID includes the capacity building of the partner NGO and the relevant staff, in **policy development and engagement**. Such activity should be within the chosen program sectors and their related areas (for example, general health or natural resources management). Examples of this policy development and engagement include membership and active participation in district/regional coordination mechanisms; health boards, interagency coordinating committees, local or national campaign planning, and development of policy positions.³*

This conflict indicates that within government there are different views on the purpose and acceptability of advocacy activities. The conflicting messages provide no certainty or clarity, and will create an unworkable situation for many ACFOA members. Implementing the draft Bill in its current form would require extensive definition of the types of advocacy allowable and at what times it can be undertaken.

The Australian community is contributing more to overseas aid organisations every year, with an average annual increase in giving of 16.5 per cent over the last five years to \$358 million in 2002.⁴ Over one million Australians give their time or money to overseas aid each year through ACFOA's 108 Code of Conduct signatories⁵.

If the methods that agencies are permitted to use to achieve their organisational objectives are reduced, then their ability to satisfy community expectations will be hampered, because the work that they undertake will become less effective. If the community does not have confidence in an agency's ability to achieve their stated objectives then giving will be reduced. This situation will create uncertainty in the ongoing viability of a great many agencies.

The same rules that apply to other activities of charities should also apply to advocacy. The advocacy role of charities should not be singled out for special attention as a cause of disqualification if these activities are furthering the dominant charitable purpose of the organisation.

Case studies

Between 1993 and 1999, 45 Australian NGOs were involved in a network which aimed to place the issue of HIV/AIDs more prominently on the agenda of both government and other organisations undertaking aid and development work. A key success of the *HIV/AIDs and International Development Network of Australia* (HIDNA) was that they provided key input into a range of policies being developed by AusAID, informing and enhancing their response to the pandemic, particularly in relation to the quality of programming, and the spread of the virus into the Pacific. AusAID recognised the value of the network and regularly canvassed their views on a range of issues, through the government-initiated Advisory Group on International Health. Dialogue between NGOs and government continues today on such issues as access to treatment.

In recent years, NGO, community and church-based advocacy has had an enormous impact on a previously neglected issue – that of the burden of international debt on the world's poor. NGOs and others recognised that no matter how good their aid programs, in many countries, poverty would never be eradicated without debt relief. It took a massive, global advocacy effort to bring the debt issue to the fore and governments around the world, including Australia's, listened and responded – making commitments to cancel \$110 billion of unsustainable debt and to work harder on fair debt restructuring mechanisms for the poorest countries. Thanks to the Jubilee campaign, the link between debt and poverty is now clear and the need to advocate for action on debt in addition to giving aid for poverty reduction is recognised by both NGOs and the creditor governments they engage with.

³ (AusAID Africa Funding Guidelines 2003–2007, p2).

⁴ Statistics derived from ACFOA's annual survey of its members in 2002 are available at www.acfoa.asn.au

⁵ <http://www.acfoa.asn.au/code/code.htm>

5.3 Increased Administration

The draft Bill states that advocacy activities are allowed if they are incidental or ancillary to the dominant charitable purpose. How the Australian Tax Office (ATO) will determine whether advocacy activities are incidental or ancillary is at this stage unclear.

At a minimum, the ATO will have to introduce administrative rulings or guidelines to interpret and implement this aspect of the Bill and processes to monitor and evaluate the compliance of charitable organisations.

If the Australian government does decide to legislate these requirements, there will be a dramatic increase in administration requirements for both the government and charities. Overseas examples demonstrate that administration costs increase markedly with these types of requirements.

Canadian charities must not spend more than 10%⁶ (although there are exceptions) of their total annual resources on advocacy activities if they want to retain the charitable status and their ability to offer tax deductibility on donations. Canadian charities have to provide annual returns to the government which include detailed financial and activity reporting. Expansive guidelines for completion of annual returns and information sheets on advocacy activities have had to be developed to assist charities.

In the United States, where similar restrictions apply, annual returns must be completed, submitted and assessed annually. Guidelines to help charities correctly complete the annual reporting requirements exceed 100 pages.

If legislation of this type was to be introduced in Australia many charitable organisations may be forced into having to defend their charitable status through the judicial system. This type of action is potentially devastating for charities in terms of the financial cost. Charitable organisations do not generally have financial reserves needed to defend their charitable status in the courts. Charities primarily rely on a combination of community contributions and government grants which are strictly allocated.

Recommendation 5

That Clause 8 – Disqualifying Purposes be replaced with wording similar to the following:

Either of these purposes is a disqualifying purpose:

- a) the purpose of advocating a political party*
- b) the purpose of supporting a candidate for political office*

⁶ Canadian Customs and Revenue Agency Policy Statement CPS – 022 Political Activities – 3 September 2003

6 ONGOING REFORM

ACFOA urges the government to continue its reform of Commonwealth, state and territory laws as they relate to charities. ACFOA members have been hampered in the pursuit of their objectives by inconsistent application and interpretation of the terms *charity* and *public benevolent institution* for different legal and administrative purposes.

ACFOA seeks fair and consistent treatment of genuine not-for-profit Australian-based overseas aid organisations. ACFOA supports the recommendations made in the *Report of the Inquiry into the Definition of Charities and Related Organisations* regarding the:

- modernisation of the definition of Public Benevolent Organisations
- the establishment of an independent administrative body (Charities Commission) to oversee the regulation and ongoing integrity of the charities sector
- a nationally consistent definitional framework for the regulation of charities.

Recommendation 6

That the government revisit the recommendations of the *Report of the Inquiry into the Definition of Charities and Related Organisations* and:

- a) establish an independent administrative body (Charities Commission) to oversee the regulation and ongoing integrity of the charities sector
- b) modernise the legislative definition of Public Benevolent Institutions, and
- c) work with the states and territories towards a nationally consistent definitional framework for charities.

7 CODIFICATION OF COMMON LAW DECISIONS

The government, in its public statements regarding the draft Charities Bill, has stated that the draft Charity Bill is simply codifying the existing common law definition of a charity. Independent legal advice sought by ACFOA on whether this is the case has indicated that although a number of areas of the draft Charities Bill do replicate the common law definition the following areas do not:

- 4 (1) (c) The inclusion of a requirement that every activity and conduct must further or aid the dominant purposes of the Charity is an additional requirement in the definition of charity.
- 4 (1) (d) The inclusion of the requirement that a charity not have a disqualifying purpose is an additional requirement to current general law. The reference to some of the matters considered as disqualifying purpose are currently addressed in the requirement for dominant purposes. However, the change of emphasis with the inclusion of a separate requirement means that technical matters of disqualification will prevent an organisation qualifying as a charity even if the same organisation would currently qualify as a result of having the requisite dominant purposes.

8 ACFOA MEMBER AGENCIES

Action Aid Australia (For Those Who Have Less)
Adventist Development and Relief Agency
AESOP Business Volunteers Limited
African Enterprise Australia
AID/WATCH
Amnesty International Australia
Anglican Board of Mission - Australia
ANGLICORD
Archbishop of Sydney's Overseas Relief & Aid Fund
Assisi Aid Projects
AUSTCARE: Australians Caring for Refugees
Australia Tibet Council
Australian Conservation Foundation
Australian Cranio Maxillo Facial Foundation
Australian Education Union
Australian Federation of AIDS Organisations
Australian Foundation for the Peoples of Asia and the Pacific
Australian Legal Resources International
Australian Lutheran World Service
The Australian National Committee on Refugee Women
Australian Relief and Mercy Services
Australian Reproductive Health Alliance
Australian Volunteers International
Baptist World Aid Australian
Burnet Institute
CARE Australia
Caritas Australia
Child Wise Formerly ECPAT
Christian Blind Mission International (Australia)
Christian Children's Fund of Australia
Christian World Service/National Council of Churches in Australia
Community Health and Tuberculosis Australia
Credit Union Foundation Australia
Diplomacy Training Program Ltd
Foresight (Overseas Aid and Prevention of Blindness)
The Fred Hollows Foundation
Friends of the Earth (Australia)
Habitat for Humanity Australia
HELP International Inc.
International Centre for Eyecare Education
International Christian Aid Relief Enterprises Limited
International Nepal Fellowship (Aust) Ltd
International Women's Development Agency
Interserve Australia
The Leprosy Mission Australia

Live & Learn Environmental Education
Marist Mission Centre
Melbourne Overseas Mission Fund
Mercy Works Inc.
Mineral Policy Institute
Mission World Aid Inc.
Muslim Aid Australia
Nusatenggara Association Inc.
Opportunity International Australia
Overseas Pharmaceutical Aid for Life
Oxfam-Community Aid Abroad
Oz GREEN - Global Rivers Environmental Education Network Australia Inc.
PALMS-Volunteering for a Global Mission
PLAN International Australia
Project Vietnam
Quaker Service Australia
R.E.S.U.L.T.S. Australia
RedR Australia
Refugee Council of Australia
Salesian Society Incorporated
Samaritan's Purse
Save the Children Australia
Sexual Health & Family Planning Australia
SIMAID
TEAR Australia
Transparency International Australia
UNICEF Australia
Union Aid Abroad-APHEDA
United Nations Association of Australia
Uniting Church Overseas Aid
Vinacare
World Vision Australia
World Wide Fund for Nature Australia
The YWCA of Australia

9 ACFOA CONSULTING AFFILIATES

Australian Red Cross
Foundation for Development Cooperation
Global Education Centre of South Australia
The Victorian Foundation for Survivors of Torture Incorporated