

Consultation on the Definition of a Charity
The Board of Taxation
C/- the Treasury
Langton Crescent
PARKES ACT 2600

25 September 2003

**RE: Charities Bill Consultation
Australian Democrats Submission on the Definition of a Charity**

I refer to your invitation to make a submission to the Board concerning the definition of a charity contained in the exposure draft to the Charities Bill.

The Democrats recognise that if legislated, such a definition will have a significant and ongoing impact on the charities sector. It is vital that the definition meets the needs of the sector as outlined by the Charities Definition Inquiry.

Workability of the definition of a charity.

We support the extended definition of charitable purposes, notably the inclusion of self-help bodies, child care organisations and contemplative religious orders.

The CDI also recommended that the last head of charitable purposes should include the promotion of human rights and the welfare of animals. I note that this intention has been reflected in the Explanatory Memorandum to the bill. The Board may give consideration to including these express examples in the body of the Bill itself to avoid any future doubt.

Our particular concern is the definition of a 'disqualifying purpose' in clause 8(2) of the Bill. We support paragraphs (a) and (b) of the definition. These paragraphs make a purpose of advocating a political party or candidate, unless ancillary or incidental, a 'disqualifying purpose'.

We submit, however, that paragraph (c) does not reflect either the modern interpretation of the definition of a charity or the recommendation of the Charities Inquiry.

Clause 8(2)(c) disqualifies an entity from being a charity if it has purposes that attempt to change the law or government policy and these purposes are more than ancillary or incidental to its other charitable purposes.

The Australian Taxation Office's Charity Pack states that an institution or fund is not charitable if its dominant purpose is advocating a political party or cause, attempting to change the law or government policy or promoting a point of view.

It must be recognised that the definition of a ‘disqualifying purpose’ in the draft Charities Bill does not represent current practice and will impose significant administrative burden on charities. It does not represent the modern view of charities as espoused in recent cases such as *ACF v Commissioner of State Revenue* (2002) VCAT 1491

As an example, the Queensland Cancer Fund may have a dominant purpose that involves the treatment and research to prevent cancer. It may however, also seek to toughen anti-smoking laws. On the ATO’s approach it would be a charity provided the toughening anti-smoking laws was not the dominant purpose of its activities. Under the Charities Bill definition, however, as soon as the anti-smoking law activities become more than ‘ancillary or incidental’, the Queensland Cancer Fund is denied charitable status.

We are particularly concerned that Charitable organisations will be forced to ‘self censor’ to ensure that they do not breach the ‘ancillary and incidental’ threshold. Because the terminology ‘ancillary and incidental’ is not clearly defined it could cause uncertainty within the organisation and within the tax office.

The Charities Inquiry report noted that ‘advocacy and policy development conducted by charities, is, in part, in response to government requests for them to provide advice and input into government decision making and administration.

This could have the potential for some organisations to monitor the amount of work they are doing that might involves changing Government policy.

In the Committee’s conclusion on page 215 of Chapter 26 of the Charities Definition Inquiry, it is stated:

“The Committee recommends that charities should be permitted to engage in advocacy on behalf of those they benefit. Conduct of this kind should not deny them charitable status even if it involves advocating for a change in law or policy.”

At 216 it states:

”The principles recommended by the Committee are that to be a charity an entity’s dominant purpose must be charitable and any other purposes must further, or be in aid of, the charitable purposes or be incidental or ancillary to them.” (emphasis added)

It appears that, in drafting the ‘disqualifying purpose’ definition the words ‘any other purposes must further, or be in aid of, the charitable purposes’ have been ignored. The focus has been merely on the ‘incidental or ancillary’ words.

Further, the conclusion to Chapter 26, Recommendation 17 states:

“That charities be permitted neither to have purposes that promote a political party or a candidate for political office, nor to undertake activities that promote a political party or a candidate for political office.”

You will note that advocacy and lobbying are not prohibited by this recommendation.

I believe that subparagraph (c) should be removed to bring the definition of 'disqualifying purpose' into line with the Charities Definition Inquiry and the modern law. Obviously, to qualify as a charity, the dominant purpose must continue to be charitable or for the public benefit. Any advocacy or lobbying work must further or aid the dominant purposes pursuant to paragraph 4(1)(c).

We are also concerned that the paragraph 4(1)(e) stipulation that the charity 'does not engage in, and has not engaged in, conduct (or an omission to engage in conduct) that constitutes a serious offence.' We submit that this definition may cause some unforeseen difficulties if, for example, a director or employee of an organisation commits an offence.

Other comments

- The Explanatory Memorandum refers to the Charities Bill as a 'code'. If this is the intention it should be clarified in the actual legislation, but to do so would remove centuries of case law on the meaning of words like 'education' and 'religion'. It would be the strong preference of the Democrats that the bill clarify and advance the definition of charity, but not expressly codify the law with the consequential cancellation of the common law that this would entail;
- We note that the Consequential amendments to this Bill have not been released. We ask that you recommend further consultation when these amendments are made public so that charities can fully assess their impact;
- We note that in drafting the definition of charitable purposes, the presumption of a public benefit for the advancement of education and religion has been reversed, making it harder to satisfy these criteria. This appears to be contrary to the intention of the CDI;
- We note with disappointment that the Bill represents an incomplete response to the CDI report. In particular, the Government has failed to respond to the Committee's recommendation to replace the category of 'public benevolent institution' with a clearer definition of 'benevolent charity'. This is a serious shortcoming in the proposed bill which the Board should seek to address. The Democrats support the recommendations of the CDI in respect of 'benevolent charity';
- In the submission to the CDI, the then Democrat spokesperson Senator Woodley argued strongly for a Charities Commission on the UK or Californian model to take over from the ATO the role of determining who is and is not a charity. The CDI made no recommendations on this reform. However, the Democrats remain of the view that such a Commission would mark a valuable advance in the administration of the law of charities.

In conclusion, the Democrats support the enactment of bill to define "charity", and the Government should be commended on bringing such a bill forward. However, the draft as presented falls short of the recommendations of the Charities definition Inquiry and needs to be brought closer to its recommendations in an effort to avoid adverse consequences for key parts of the charitable sector.

Should you require further information concerning this submission, please do not hesitate to contact me on 07 3720 8999.

Yours sincerely,

Senator John Cherry
Australian Democrat Senator for Queensland